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JSN
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v.3

A
COLLECTION
OF
RECORDS AND ACTS OF PARLIAMENT,
WITH
REPORTS OF CASES
ARGUED AND DETERMINED
IN
THE COURTS OF LAW AND EQUITY,
RESPECTING
TITHE S.

BY SIR HENRY GWILLIM, KNT.
LATE ONE OF HIS MAJESTY'S JUDGES OF THE SUPREME COURT
AT MADRAS.

THE SECOND EDITION,
WITH NOTES, REFERENCES, AND A CONTINUATION OF THE
CASES AND STATUTES;

By CHARLES ELLIS,
OF LINCOLN'S INN, ESQ. BARRISTER AT LAW.

IN FOUR VOLUMES.

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C A S E S

RELATING TO

T I T H E S.

M. 16 Geo. III. A.D. 1775. Scac.

Bedford v. Sambell. [MS.]

IN this case a trial at law was ordered on the following *moduses*.

First, “Whether the parson is to have the tenth lamb that shall be fallen within the parish, to be tithed by the parson and parishioner on *St. Mark’s Day*, in manner following, *viz.* the parishioner or owner to take two, then the parson to take one, then the parishioner or owner seven, to make up the number ten; then the parishioner to take two again as he did at first, and proceed in the like manner throughout the whole; and if there remain any odd number, the parishioner or owner to pay 3*d.* for every such lamb immediately, or at *Michaelmas*, the usual time.”

Rankness of a *modus* is a question of fact not of law. A custom to tithe lambs on *St. Mark’s day*, though apparently unreasonable, is yet a fact for a jury to decide upon. S. C. 3 Wood’s Decr. 514.

Secondly, “Whether wool is to be tithed at shearing time in the same manner as lambs; and if there be any odd fleeces remaining, the parishioner is to pay 2*d.* for each immediately, or at *Michaelmas*, the usual time of accounting.”

Thirdly, “Whether, for every milch cow, there is to be paid to the parson 1*d.*”

Fourthly, “Whether, for all apples made into cider, there is due and payable to the parson for every hogshead of cider so made, 2*d.* at *Michaelmas*.” The issues to be tried by a special jury, and the judge to indorse, &c.

The said issues was therefore tried by a special jury, who found the same payable accordingly, in lieu of the tithes of lambs, wool, milk, and cider; but on the 19th day of *June* 1776, a new trial was granted, on payment of the costs, to try the two *moduses* with respect to lambs and wool; and the defendants thereupon submitted to abandon the proof of the said two *moduses* respecting the manner of [1059] tithing lambs and wool, and declined proceeding to a new trial.

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Supra 708.

Upon the motion for the new trial, the court delivered themselves to the following effect:

Lord C. B. *Smythe*. — There is no objection to the *modus* for the cow, nor for cider. The question is as to the *modus* for lamb and for wool. Wherever the payment approaches near the value, it is a fact to shew, that it cannot be an ancient *modus*. The value of 2s. 6d. for a lamb may come nearer to the value in some counties than in others. In the case of *Giffard v. Webb* the court had offered an issue, which the party did not proceed upon; and the House of Lords would not therefore reverse the order for the issue. The lamb and wool is so near to the real value, that I think the issues ought to be tried again. As to the day of payment, *St. Mark's Day*, it cannot be a reasonable time; for they cannot all live at that time without the dam. As to the objection to the evidence of the receipts, I think it good evidence. It is not proof by similitude of hand-writing. It was produced as an old paper coming from its proper place and without suspicion.

Eyre B. — I think the receipts were properly admitted. Such evidence is from necessity admissible. The receipt in its nature purports to be proper evidence, and it cannot be better established.

As to tithing lambs on *St. Mark's Day*, I do not think the usage only is necessary to establish a custom; but the reasonableness is likewise material. If it is impracticable, that ought to decide against the usage. If the lambs are of no value, or not of proper value on *St. Mark's Day*, the custom is unreasonable. It is proved, that lambs fall from *Christmas* to near *Midsummer*, and cannot live before ten weeks old. Such a custom may not be bad upon the face of it, because the parson has a benefit; but still it ought to go to a jury; and if facts are proved to them, which shew that in the country, where the question arises, it is unreasonable, they ought to find against it.

As to the rankness of the *modus* for lambs and wool, such an objection used to be considered as a legal objection, but it is really a question of fact. The case of *Giffard v. Webb* decided only, that such a *modus* was not bad upon the face of it, but that it ought to be left to a jury. And in the present case, the jury ought to have given the objection to rankness its proper force (a).

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Hotham B. — The reasonableness of the time of tithing lambs is a fact to go to a jury; but I think, from the evidence it appeared to be unreasonable. And I think the payment for lamb and wool is so great, that it could not have been an ancient payment, and I

(a) See *Wood v. Harrison*, supra 972. n.; as to the *modus* of 3d. a lamb.

should have been much better satisfied, if the verdict had been as to those issues the other way.

Perryn B. of the same opinion.

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M. 16 Geo. III. A.D. 1775. Scac.

Lloyd v. Mortimer and Kirkman.

THIS was a bill by the plaintiff, as vicar of the parish of *Stapenhill* in the county of *Derby*, against the defendants, setting forth, that the plaintiff was, and for several years last past had been, vicar of the said vicarage, and, as such, entitled by endowment, prescription, or otherwise, to all tithes of hay and grass, and clover cut for hay, and to all small tithes arising, renewing, increasing, and growing within the said parish, and the tithable places thereof, and particularly within the village, township, or hamlet of *Caldwall*, lying within and parcel of the said parish, and that the defendants had severally been the owners and occupiers of divers farms, lands, and tenements within the said hamlet, and that from *Midsummer* then last past, the defendants had divers tithable matters and things arising, renewing, and growing on the lands occupied by them in the said parish, the tithes whereof became due, and ought to have been paid to the plaintiff; it was therefore prayed, that the defendants might be decreed to account with the plaintiff, for the value of the said tithable matters and things, and might pay to him what should appear to be due on the taking such account.

S. C.
Serj. Hill's
MSS.
vol. xi.
p. 70.
3 Wood's
Decr. 516.
7 Bro.
P. C. 493.
(1st ed.)
A deed of
composition
dated
1676,
though
signed by
the patron
ordinary
and vicar,
is not bind-
ing on the
successor.

The defendants, by their answer to the said bill, said, that they were occupiers of certain lands within the hamlet or village of *Caldwall* in the parish of *Stapenhill* in their said answer specified and mentioned, but insisted that the plaintiff was not entitled to any tithes in kind of any tithable matters arising within the said village or hamlet of *Caldwall* either from the said defendants or any other person whomsoever, owners or occupiers of any lands, tenements, or hereditaments, or any payment in lieu or respect thereof, other than and except that from time immemorial there had been paid by the inhabitants, proprietors, and owners of lands and tenements within the said village, township, or hamlet of *Caldwall*, to the plaintiff and his predecessors, vicars of the said parish for the time being, the sum of 6*l.* on the feast of *St. John* the Baptist in every year for and as a *modus*, and in full payment and satisfaction for and in lieu of all tithes, rights, compositions, obventions, and emoluments whatsoever due or payable to the vicar for the time being of the said parish of *Stapenhill*, from the inhabitants, proprietors, and occupiers of lands and tenements within the said village or hamlet of *Caldwall*, in respect of such lands and tenements; and the defendants contended that such a *modus* or ancient payment

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of 6l. had been confirmed by immemorial custom as well as by a certain indenture, bearing date 22d September 1676, in the words following; that is to say,

“ *Hæc Indentura facta inter Willielmum dominum Paget, Baronem de Beandesert, verum et indubitatum patrom vicariæ perpetuæ ecclesiæ parochialis de Stapenhill in comitatu Derbiæ, Litchfeldiæ et Coventriæ diocesi, et Johannem Lucas artium magistrum, vicarium perpetuum ejusdem vicariæ perpetuæ ecclesiæ parochialis de Stapenhill antedictâ, ex consensu et assensu reverendi in Christo patris et domini, domini Thomæ providentiâ divinâ Litchfeldiæ et Coventriæ episcopi, ex unâ parte, Samuelem Sanders de Caldwell, in comitatu et diocesi prædictis, armigerum, Edwardum Holland, de iisdem, generosum, Elizabetham Aston, viduam, Thomam Webster, Thomam Callingwood, Willielmum Cox, Georgium Thrumpton, de iisdem, yeomen, Thomam Baxter, Ricardum Capenhurst, Thomam Baker, de iisdem, husbandmen, Thomam Jackson, de iisdem, carpenter, Thomam Corbitt, de iisdem, blacksmith, aliosque omnes incolas dictæ villæ de Caldwell prædictâ, Ricardum Bath de Linton in comitatu Derbiæ prædicto, et Robertum Nicklinson de Swadlincote in comitatu et diocesi prædictis, husbandmen, et Willielmum Lowe de Burton super Trent in comitatu Staffordiæ, et diocesi prædictâ, shoemaker, proprietarios et occupatores quarundem terrarum, infra eandem villam de Caldwell prædictâ jacentium, ex consimili consensu et assensu reverendi in Christo patris et domini, domini Thomæ providentiâ divinâ Litchfeldiæ et Coventriæ episcopi, ex alterâ parte; TESTATUR, quod tam pro bono capellæ de CALDWALL infra villam de Caldwell prædictam et inhabitantium villæ prædictæ, quam pro bono ecclesiæ parochialis de STAPENHILL prædictâ, de quâ quidem ecclesiâ de Stapenhill prædictâ capella de Caldwell prædictâ membrum est; ac etiam pro, et in consideratione acquietantiæ et finalis concordantiæ, omnium differentiarum et controversiarum, de et concernent, omnes et singulas decimas, oblationes, obventiones, compositiones, aliaque jura, et emolumenta ecclesiastica quæcunque, vicario perpetuo vicariæ perpetuæ ecclesiæ parochialis de Stapenhill prædictâ, per inhabitantes, possessores, et occupatores terrarum, infra villam de Caldwell prædictâ jacentium, debitas et solutas; agreeatum, concordatum, et conclusum est, et per præsentis inter partes prædictas, ex consensu et assensu antedicti reverendi in Christo patris, concordatum est et conclusum, quòd præfatus Johannes Lucas, vicarius perpetuus vicariæ perpetuæ ecclesiæ parochialis de Stapenhill prædictâ, ejusque successores vicarii perpetui ejusdem vicariæ perpetuæ, semel in quâlibet mense, annuatim, in quolibet anno imperpetuum divinas preces in capellâ de Caldwell prædictâ, secundum formam libri communium precum, leget, et post lectionem earundem, juxta morem ecclesiæ Anglicanæ, concionabitur; præfatique incolæ de Caldwell prædictâ, ac proprietarii et occupatores*

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terrarum infra eandem villam jacentium, omnes et singuli, et eorum hæredes, executores, administratores, sive successores, eidem Johanni Lucas, et successoribus suis, vicariis perpetuis ejusdem vicariæ perpetuæ ecclesiæ parochialis de Stapenhill prædictæ, summam sex librarum, legalis monetæ Angliæ, in plenam contentationem, satisfactionem, et exonerationem omnium et omnimodum decimarum, jurium, compositionum, obventionum, oblationum, juriumque, et emolumentorum ecclesiasticorum quorumcunque, infra eandem villam de Caldwell prædictæ, qualitercunque crescentium, provenientium, renovantium, aut aliquo modo contingentium, eidem vicario perpetuo, et quovis modo debitorum, aut solvi consuetorum, ad festum sancti Johannis Baptistæ annuatim in quolibet anno imperpetuum solvent; idemque Johannes Lucas vicarius perpetuus antedictus, ejusque successores, vicarii perpetui vicariæ perpetuæ ecclesiæ parochialis de Stapenhill prædictæ, eandem summam sex librarum, in plenam contentationem, satisfactionem, solutionem, et exonerationem omnium et singularum decimarum, jurium, compositionum, obventionum, oblationum, et emolumentorum ecclesiasticorum quorumcunque prædictorum; et, ut præfertur, quovis modo debitorum aut solvi consuetorum imperpetuum ad festum prædictum accipient et recipient: IN CUJUS rei testimonium partes ad presentes sigilla sua iisdem mutuo apposuerunt vicesimo secundo die mensis Septembris, anno regni domini nostri Caroli Secundi, Dei gratiæ, Angliæ, Scotiæ, Franciæ, et Hiberniæ, regis, fidei defensoris, &c. vicesimo octavo, annoque Domini 1676. Et nos episcopus antedictus in fidem et testimonium præmissorum sigillum nostrum episcopale presentibus apposuimus. Will. ✕ Pagett, John ✕ Lucas, Tho. ✕ Litch. et Coventr."

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The cause being at issue, several witnesses were examined on both sides.

On the part of the plaintiff it was proved, that the said village or hamlet of *Caldwall* is part of the parish of *Stapenhill*, and that the inhabitants of *Caldwall* contributed to the repair of *Stapenhill* church. It was also proved, that the vicar of *Stapenhill* for the time being had, as far back as the memory of witnesses went, collected and received tithes in kind for all hay, clover, lamb, wool, fruits, eggs, and pigs, and other small tithes arising within the other parts of the said parish, not parcel of the village of *Caldwall*.

On the part of the defendants it was proved, that *Caldwall* was a chapelry, in which there was a chapel of some antiquity, repaired by the inhabitants of the hamlet of *Caldwall*.

It was also proved, that the sum of six pounds had been raised by a levy according to the pound rate, and paid for many years to the vicar of *Stapenhill* for the time being, and they also proved that tithes in kind of the several articles claimed by the bill, had

1775. not, during the memory of living witnesses, been paid to the vicar of Stapenhill.

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The cause came on to be heard before the barons of the court of Exchequer on 11th *December* 1775, and on the hearing there were produced and read, on the part and behalf of the plaintiff, the indenture dated 22d *September* 1676, in the defendant's answer mentioned:

An exhibit marked (C) being a terrier, dated 23d *June* 1665: signed *John Lucas*, and others, wherein is the following entry, viz.:

“ Item, pigs, geese, wool, and lamb, are paid in the parish of *Stapenhill* and town of *Caldwall*, according to the ancient law, *foetus ablactatus debet esse, antequam præstetur*, (to wit) when they are weanable, or of strength to live without the dam.

“ Item, hay, hemp, flax, calves, colts, all manner of fruit and *Easter* offerings, are paid in the parish, and from all the town of *Caldwall*, without exception, for this vicarage anciently was endowed *omnibus minutis decimis*.”

An exhibit marked (A.) being a terrier dated 29th *September* 1719, wherein is the following entry:

[1064] “ All manner of tithes (excepting corn only) as pigs, geese, wool, lamb, calves, colts, eggs, hay, hemp, flax, and all manner of fruit and *Easter* offerings have formerly been paid in kind to the vicar of *Stapenhill*, by the inhabitants of *Caldwall*; but by an agreement made between the vicar and the said inhabitants bearing date 22d *September* 1676, by the consent of the patron and lord bishop, declared by their being parties to the same, the said inhabitants pay in lieu of all tithes and profits due from thence to the vicar, the sum of six pounds yearly, on *St. John Baptist's Day*, which the chapelwarden gathers and pays the day it becomes due.”

An exhibit marked (B.) being a terrier, dated 12th *July* 1726; an exhibit marked (D.) being a terrier, dated 30th *October* 1701; and an exhibit marked (E.) being a terrier, dated 2d *February* 1705.

And on behalf of the defendants there was produced and read a terrier dated 23d *June* 1682, wherein is contained the following entry, viz.:

“ Item, pigs, geese, wool, and lambs are paid in the parish of *Stapenhill*, excepting *Caldwall*, according to the ancient law, *foetus ablactatus debet esse, antequam præstetur*, (to wit) when they are weanable, or of strength to live without the dam.

“ Item, six pounds of monies paid from the town of *Caldwall*: hay, hemp, flax, calves, colts, all manner of fruit and *Easter* offering, are paid in the parish, excepting *Caldwall*, for this vicarage anciently was endowed *omnibus minutis decimis*.”

On reading this written evidence, and the depositions, the court decreed, that it be referred to the Deputy-remembrancer to take an account of what was due to the plaintiff from the defendants respectively, for the value of the tithes demanded by the bill; and that the said defendants should pay to the plaintiff what upon such account should be found due to him for the value of the said respective tithes.

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From this decree the defendants appealed to the House of Lords, stating the following reasons:

1. Terriers signed by the incumbent entitled to the tithes, and by the churchwardens or inhabitants of the parish who are liable to the payment of the tithes, are admitted to be read in evidence, as the declarations of parties standing in opposite interests, but both interested in the manner of rendering the tithes within the said parish, and no terrier is perfect, or ought to be admitted in evidence, if signed by the incumbent only, or by the inhabitants only. The above terrier of 1665, which was received in evidence in this cause, appears to be signed by *John Lucas* the vicar, and by four persons, who are styled churchwardens, and are to be presumed to be the churchwardens of the church of *Stapenhill*, which is the parish-church, and not the chapelwardens of the chapelry of *Caldwall*.

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It is therefore improper to be admitted in evidence, as only one of the parties signing the terrier is interested in the payment of tithes in *Caldwall* (namely) the vicar, and the rest of the parties not; and it is no more admissible in evidence, respecting the payment of tithes in *Caldwall*, than a terrier signed by the vicar of *Stapenhill*, and the inhabitants of a neighbouring parish. If the terrier be read, it only proves the impropriety of giving countenance to it as evidence; the substance of the terrier, so far as regards the present cause, being no more than the assent of the vicar and four marksmen to a proposition in the following terms: "pigs, geese, wool, and lamb, are paid in the parish of *Stapenhill* and town of *Caldwall* according to the ancient law *foetus ablactatus debet esse, antequam præstetur*; and hay, hemp, flax, calves, colts, fruit, and offerings, are paid in the parish, and from all the town of *Caldwall* without exception, for this vicarage anciently was endowed *omnibus minutis decimis*."

2. It is undoubted in this cause, that the vicar's right to tithe in kind within the chapelry of *Caldwall* was denied one hundred years ago.

That by an agreement, with the concurrence of the parson, patron, and ordinary, (which there is no reason to suspect to have been unfair), a certain annual payment was recognized and established, not as a composition for tithes payable in kind, but as a compromise of a disputed claim; that by means of such agreement

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having so long subsisted, all memory and trace of any other payment is lost and obliterated.

Under which circumstances, it is submitted, that it is inequitable to permit the vicar to avail himself of his general title; and the appellants therefore hope, that the respondent's bill will be dismissed.

On the other hand, the respondent in affirmance of the decree urged the following reasons:

[1066] 1. The respondent proved his right to the several species of tithes claimed by his bill in other parts of the parish, and there was no pretence that any body else had any title to tithe in kind. The single question is, whether the payment of six pounds is a legal exemption from payment of tithe in kind. There is no evidence that the payment existed before the deed of 22d *September* 1676: the terriers are evidence to the contrary, and the indenture of 22d *September* 1676, doth not contain any declaration of or reference to any *modus* or customary payment then existing within the said parish; but on the contrary, from the whole tenor and effect of the said indenture, it appears to be no more than an ineffectual attempt to make a real composition, at a time when all parties to that deed were by law disabled from making any composition whatsoever, binding or obligatory on the successors of the vicar; and therefore it is conceived, that the said indenture, instead of maintaining the pretensions of the appellants, affords the strongest presumption, that no such *modus*, or customary payment, as contended for by the appellants could have existed at any time when that deed was executed; otherwise it must be presumed, that such *modus* must have been known to the inhabitants of the village or hamlet of *Caldwall*, who are parties to that indenture; and it is highly unreasonable to suppose, that they would have omitted to take notice of such *modus*, or customary payment, in case any such had then existed.

2. The parol evidence produced on the part of the appellants does not amount to any proof of such *modus* or immemorial customary payment, as contended for by the appellants; but on the contrary such parol evidence, when connected with the indenture of 22d *September* 1676, amounts to no more than a proof of an acquiescence under the temporary composition (introduced for the first time by that deed) on the part of the several vicars of *Stapenhill*, since the making of that indenture; which acquiescence is not in any sort conclusive or binding on the respondent.

The Lords affirmed the decree (a).

(a) See also *Jones v. Snow*, *infra* 1199.

M. 16 Geo. III. A.D. 1775. Scac.

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Travis v. Oxton. [Eyre's MSS.]

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v.
Oxton.

S. C.
Serj. Hill's
MSS.
vol. xiii.
p. 520.

BILL by the plaintiff, as vicar of *East Ham* in the county of *Chester*, for tithes of hay and all small tithes from the owners of the demesne lands in the townships of *Netherpoole*, *Little Sutton*, *Great Sutton*, and *Whitby*, in that parish.

reported only *quoad* the defendant *Maddock*. 3 Wood's Decr. 523. 3 Bro. P.C. 482. (1st ed.)

[1067]
The owners
of lands in
the town-
ship of *Ne-
therpoole*
insist on a
modus of
40s. a year,
in lieu of
all small
tithes and
and other
vicarial
dues; and
that the
tithes of
hay belong
to their
landlord, as
the impro-
priator of
the parish
of *East
Ham*.

The defendants, *Oxton* and *Healing*, admitted, that the plaintiff had been presented by the crown to the vicarage of *East Ham* in the year 1766; that in the year 1767 the same became void by his cession thereof; and that he was again presented thereto by the dean and chapter of *Chester*; but, whether he had been lawfully constituted vicar thereof they left him to prove; and denied that, to their knowledge, the vicarage had been immemorially endowed with the tithe of hay and hay-grass, agistment, and all other small tithes, particularly with respect to the lands and hereditaments severally occupied by them, and which, they admitted, composed the demesne lands or township of *Netherpoole*; and that the said lands were the inheritance of *sin F. Poole* bart. under whom they held the same as farmers and tenants. They all admitted, that the plaintiff as vicar, was entitled to divers species of tithes arising in some parts of the parish; but by what right they could not tell, he not having set forth in his bill any endowment or other right, and they having never seen any endowment or other evidence of any right under which he was entitled; but they said, he was not, either as vicar or otherwise, entitled to receive the same species of tithes throughout the whole parish, for that he and his predecessors had usually received different species of tithes from different persons, and in respect of different lands in the said parish. They further stated, that the said parish had formerly been called the parish of *Sutton*; that it was then also frequently so called; that it consisted of a rectory impropriate, as well as of a vicarage and of several different manors and townships, viz. the manor and township of *East Ham* with *Plimyard* and *Carlett*, the manor and township of *Hooton*, the township of *Childer Thornton*, the manor and township of *Netherpoole* and *Overpoole*, the manor and townships of *Great Sutton* and *Little Sutton*, and the township of *Whitby*; that at the time the greater monasteries were dissolved, in the thirty-third year of *Henry* the eighth, the said rectory impropriate, then called the rectory of *Sutton*, with the several manors and townships before mentioned, and the tithes belonging thereto, were in the possession of the abbot of *Chester* as part of the possessions of the greater monastery of *Saint Werburgh* in *Chester*: that the said possessions were then seised into the hands of *Henry* the eighth; that the said rectory,

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manors, lands, and townships, or some of the manors and townships, together with several other manors, lands, and hereditaments in the city of *Chester*, were granted by queen *Elizabeth* on or about the nineteenth day of *December*, in the twenty-second year of her reign, to *Hugh Cholmondeley*, since deceased, under a reserved fee-farm rent thereout of 168*l.* 19*s.* 10*d.*; that she afterwards granted the said rent to the dean and chapter of *Chester*; that the said *Hugh Cholmondeley*, or some of his descendants, afterwards sold and conveyed to different persons several different parts of the said rectory, manors, townships, and lands; that the township of *Netherpoole* consisted only of the hall and the demesne lands; that the ancestors of sir *F. Poole* had purchased the said township of the said *Hugh Cholmondeley*, or of some of his descendants, who were entitled thereto under the grant from queen *Elizabeth*; that sir *F. Poole* then was, and that he and his ancestors, and those under whom he claimed, had been, for time immemorial, owners of the said township; that the said sir *F. Poole*, and those under whom he claimed, had, for time immemorial, had and enjoyed; and that he then held and enjoyed, and was entitled to the tithe of corn, grain, and hay, arising in the said township of *Netherpoole*, as belonging to the said impropriate rectory; that the said sir *F. Poole* and his ancestors, and those under whom he claimed, and their lessees or tenants, had, for time immemorial, held and enjoyed the hall and the demesne lands of *Netherpoole* exempted from the payment of all small tithes, *Easter* dues, offerings, and other vicarial dues, on payment of a certain immemorial *modus*, pension, or customary payment of forty shillings a year, at *Easter*, to the vicar of the said parish. The defendants then further stated, that part of the said parish, called the township of *Overpoole*, was, all of it, they believed, the estate and inheritance of the said sir *F. Poole*; that he and his ancestors, and those under whom he claimed, had, for time immemorial, been entitled to, and had taken all the tithes of corn and grain within *Overpoole*, as belonging to the said rectory impropriate; and that the vicars of the parish had immemorially, or for some long time, by virtue of some endowment or prescription or otherwise, received, taken, and enjoyed, the tithes of hay, and all small tithes in kind, arising within *Overpoole*, or some payment in lieu thereof. The defendants then further stated, that the vicars of the said parish had, by virtue of some endowment or prescription or otherwise, had and taken, and that the plaintiff, as vicar, was then, by virtue of some endowment or prescription or otherwise, entitled to, and had taken, the tithes in kind of hay and hay-grass, and *Easter* dues, and other small tithes, in several parts of the

[1069] parish; that in other parts he was not entitled to any tithe of hay but only to small tithes and vicarial dues; and that in other parts

he was entitled to some *moduses* or payments in lieu of such small or vicarial tithes or dues. They further said, that they did not know whether the plaintiff, as vicar of the said parish, was entitled, by virtue of any endowment, prescription, or otherwise; or whether he had taken the tithe of agistment in any part of the parish; or whether the former vicars were entitled to, or had taken the same. They denied that the vicarage had ever been endowed with the tithes of hay, hay-grass, agistment, or any small tithes, throughout the whole of the parish; and insisted, that he was only so endowed out of particular townships or places therein; that the vicars had only taken and enjoyed such tithes partially from and out of particular parts of the parish; that in other parts thereof, the persons entitled to the rectory were entitled to and had enjoyed the tithes of hay, hay-grass, and agistment tithes; and that they, the defendants, as tenants to the present impropiator, were entitled to all the tithes of hay and hay-grass arising on the lands occupied by them respectively within the said parish, as the same were part of the demesne lands of *Netherpoole*. They admitted, that they had, in the year 1771, occupied the said demesne lands of *Netherpoole*, as also the hall-house called *Pool Hall* and the *Dairy House*; and set forth the quantity of land from which they had in that year mowed hay and hay-grass; and admitted that they had carried the hay thereof away, without setting out the tithe, or making the plaintiff any satisfaction for the same, which they insisted they had a right to do, as the tenants of the said sir *F. Poole*, who claimed the great tithes of the demesne lands, as part of the rectory impropriate. They also admitted, that in the said year they withheld all their small tithes, without making the plaintiff any satisfaction for the same, as they believed no small tithes whatever had ever been paid to any vicar of the parish for the demesne lands; and they insisted, that none were due for the said lands, except the said yearly sum of forty shillings in lieu thereof: and that the vicars had till that year received the same in full satisfaction for the small tithes or other vicarial dues of the said demesne lands.

The defendant *Whitehead* stated in substance the same matters relating to the plaintiff's being instituted vicar as the other defendants had done; and denied, that the vicarage was endowed with the tithe of hay and hay-grass, or that he was entitled to the same from the tenements and lands he occupied in the said year in the township of *Little Sutton*; and he described the lands and the number of acres they contained; and said, that they were all anciently the estates and inheritance of the said *Cholmondeley* family under the afore-mentioned grant; stating the title fully in his answer, as the other defendant had done. He further said, that the plain-

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v.
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The land-holders of *Little Sutton* say the like as to tithe-hay; and that certain *moduses* are due in lieu of small tithes.

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v.
Oxton.

tiff had some times at *Easter*, when he received his *Easter* dues, received some payment for some kinds of small tithes in respect of those his tenements, which were no part of the demesne lands, viz. for every milch cow, three half-pence; every farrow cow, one penny; for a servant, two-pence; offerings for himself, three-pence; for the rest of his family, sixpence; and one penny, called the house-penny or smoke-penny, in lieu of all tithes of firewood or other things used and consumed in the house, and for all personal tithes due from any of the inhabitants of the house (except *Easter* offerings); a garden-penny, in lieu of all tithes of fruit and garden-stuff; an hen-penny in lieu of fowls and eggs; and a tithe-penny, otherwise tin-penny, otherwise tithing-penny, as a *modus* in lieu of all other small tithes and vicarial dues in kind, not at times taken in kind, and therein excepted, as being so taken in kind as aforesaid, and except offerings; and therefore he insisted, that the plaintiff was not entitled to any other small tithes arising within the said parish. He admitted, that in the year 1771 he had cut hay and hay-grass upon his said lands, and had carried the same away, without setting out the tithe thereof, or making any satisfaction for the same; and he insisted, that he had a good right so to do, the plaintiff not having any right thereto. He further said, that he had tendered the several *moduses* or customary payments to the vicar.

The land-
holders of
Great Sutton answer
in like
manner.

The land-
holders of
Whitby say
that a tithe-
penny is
payable in
lieu of all
tithe-hay
arising an-
nually on
Robinson's
tenement,
on *Salmon's*
tenement,
and on
Lightfoot's
tenement
respect-
ively.

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The defendant *Davies* stated the same in respect of the tenements and lands occupied by him in the township of *Great Sutton*.

The defendant *Whitehead* put in the like answer for her tenements and lands lying in the township of *Great Sutton*.

The defendant *Maddock* put in the like answer for his farm and lands in the township of *Whitby*. He further said, that no tithe-hay in kind had ever been paid or was payable to the vicar of *East Ham* for any of the lands heretofore part of any of the tenements called *Robinson's Tenement*, *Salmon's Tenement*, or *Lightfoot's Tenement*; but that in lieu thereof there had been annually paid by the occupiers of the said tenements respectively to the vicar the following **moduses*: the sum of one penny, in lieu of the tithes of all the hay yearly arising on *Robinson's Tenement*; of one penny, in lieu of tithe-hay of *Salmon's Tenement*; and the same for *Lightfoot's Tenement*; that the said *moduses* so paid had usually been called tilt-penny by the vicars of the parish and by others; that the same were payable by the occupiers of the said three tenements respectively to the vicar annually at *Easter*; and that the plaintiff had received the same to *Easter* 1771; and he set forth the various other lands which he occupied, and which of them paid tithe-hay, and which were exempt from such payment; and averred, that he did not believe that any part of the separate farms occupied by him were, at any time within the memory of man, inclosed from the ancient common or waste

lands lying within that part of *Whitby* which was within the parish of *East Ham*.

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The plaintiff replied; the defendants rejoined; and witnesses were examined for all parties; and after hearing counsel for several days; and receiving a great body of evidence; the judgment of the court was delivered by *Eyre B.* the Lord C. B. *Smythe* being too much indisposed to attend.

Eyre B. — This is a bill brought by the plaintiff, who is vicar of the parish of *East Ham* in the county of *Chester*, against all the defendants, who are six in number, for an account of tithe-hay, and against two defendants, *Oxton* and *Healing*, for an account of small tithes also. The plaintiff claiming, as he must do, under an endowment, five out of the six defendants absolutely deny that the vicar is endowed of the tithe of hay. As to the defendant *Maddox*, he, having set up a *modus* by his answer in lieu of tithe of hay, does admit, that the vicar is *sub modo* endowed of this species of tithe; and the same observation applies as between the defendants, *Oxton* and *Healing*, respecting the vicar's endowment of small tithes, they, having set up a *modus* payable to the vicar in lieu of these tithes.

The vicar has entered into proof of his endowment both of tithe of hay and small tithes. No instrument or endowment in writing is produced; but the plaintiff has read evidence of the vicar's having enjoyed those species of tithes, which is evidence of prescription, which supposes an endowment. Upon the proofs it appears, that there are eight townships within this parish; that tithe of hay in kind is yielded to the vicar throughout *three* townships, *viz.* *East Ham*, *Childerthornton*, and *Overpoole*; and in part of two townships, *viz.* all the townships of *Netherpoole* and *Hooton*, except the hall and demesnes, and in *Whitby* for the lands lying in that part of *Whitby* which is in the parish of *East Ham*, and belonging to houses situated in that part of *Whitby* which is in the parish of *Stoke*: that a tilth-penny, in lieu, as all the witnesses agree, of tithe-hay has been paid to the vicar throughout the township of *Great Sutton*, and all *Little Sutton* except the Hall and demesnes, and for the rest of the township of *Whitby* lying in the parish of *East Ham*; and lastly, that a composition, which certainly may have been, and almost all the witnesses agree was always understood to be, in lieu, *inter alia*, of tithe of hay, has been paid to the vicar for the remaining part of the parish (that is to say), for the township of *Netherpoole*, and for the two Halls of *Little Sutton* and *Hooton*. In addition to this evidence there has been read an extract from a parliamentary survey, in which it is stated, that there is belonging to this vicarage the tithe of hay *Childerthornton*, *Hooton*, *Overpoole* and *Netherpoole*; and it is in proof, that the impropriators have collected tithes of corn

What is sufficient evidence of an endowment of tithe of hay in the absence of a written endowment.

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and grain only throughout the parish: and though they and their tenants have retained the tithe of hay arising upon their own demesnes, the observation weighs with us, that this retainer being accompanied with the circumstance of a composition paid to the vicar, which certainly may be for tithe of hay, cannot necessarily infer a right in them as impropiators to this species of tithe. And as to the small tithes, the witnesses all agree, that the vicar has always received these tithes, or a composition for them, throughout the parish. Upon this state of the proofs we are all agreed, that without laying much stress upon the parliamentary survey, which cannot be understood to be very accurate as to all the vicarial dues, the vicar has given sufficient evidence of an endowment of tithe of hay throughout the parish; and as to small tithes, there is certainly no room for question concerning them.

It was objected, and very much pressed in argument on the part of the defendants, respecting the evidence of an endowment of tithe of hay, 1st, that part of the evidence referred to ought not to have been read, as being evidence of things not in issue in the cause; and 2dly, that proof of the payment of a *modus* cannot possibly be applied to support a demand of tithes in kind. As to the first of these objections, it is true, the court is to decide *secundum allegata et probata*, and it must be admitted that in our pleadings which are borrowed from the civil law, the allegation is indispensably necessary to introduce the proof. But this rule extends thus far only; to require that the several points of charge and discharge to which the examination is to be directed should be alleged or stated in the

[1073] pleadings. Such facts as constitute the points in the cause are to be in issue. But there is a well-known legal distinction between the fact and the evidence of the fact: though the parties are bound to state the fact, they are not bound to disclose their evidence. Now to apply this doctrine to the present case—A vicar claims to be entitled by endowment: he states an endowment; the endowment is denied. The endowment is a fact, or a point in issue between the parties: they are to examine witnesses and to adduce their evidence on both sides to this fact or point in issue between them. A writing may be the evidence of the endowment: it was admitted expressly in the argument, that the writing need not be alleged or be in issue. But a writing is but one species of evidence of an endowment; enjoyment is also evidence of an endowment. If a writing, being the evidence, need not be expressly alleged; I suppose it must be admitted, that the enjoyment need not be stated. If the fact of enjoyment need not be stated, I suppose the infinite variety of facts and circumstances which when combined together in evidence conclude to the fact of enjoyment, will not be expected to be stated. The true objection to be taken in such a case is, not

that they have examined to facts not in issue, but that they have examined to facts, which are not evidence of facts in issue. And the second objection applies in this way; for they say for the defendants, that proof of a payment of *moduses*, good or bad, cannot possibly be applied to support a demand of tithes in kind. Let us examine into the ground of this objection. If the vicar proves that he is endowed of the tithe of hay, that endowment entitles him *primâ facie* to demand tithe in kind, just as the common law right of a rector entitles him; because tithe in kind is the original legal right.

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This doctrine was expressly laid down in the case of *Fox v. Butty* in *Bunbury* 87., and determined on the 16th of *November* in *Michaelmas* term 1721. Enjoyment is admitted to be a species of evidence of endowment of tithe of hay: now surely the receipt of a pecuniary or other composition in lieu of tithe of hay in kind, is as much an evidence of the enjoyment of the tithe of hay in lieu of which it is paid, as the receipt of tithes in kind is. It is a manner of taking the tithe of hay; and one manner of taking the tithe is as much evidence of the enjoyment of the tithe, as another manner of taking it. If the receipt of a composition in lieu of tithe is enjoyment of that tithe; if enjoyment is evidence of an endowment; if endowment is *primâ facie* a title to the tithe in kind; it should seem that a bad *modus* paid in lieu of tithe of hay may be applied to support a demand of tithe-hay in kind. For what is a bad *modus*? It is a composition pecuniary or otherwise for the particular species of tithe in lieu of which it is paid. It is a good composition so long as it is submitted to: if it has been in fact received, it is a bar to an action or a bill for an account of tithes for the time; for it is a satisfaction *pro tempore*. As soon as it is broken, the original right, the right to demand the thing in specie for which it was substituted, revives; and therefore it is, as it seems to me, that when a *modus* is disallowed, it is of course for the court to decree an account of tithes in kind. I desire it may be understood there is a manifest distinction between disallowing a *modus* that is proved, and not admitting proof of a good *modus* which there is not evidence sufficient to support. The principles upon which the court decree an account of tithes in kind upon disallowing a *modus*, seem to apply to prove that the vicar may even establish his title to an account of tithes in kind, by the medium of proof of a bad *modus* only in the first instance: for it amounts to proof of payment of a temporary composition in lieu of the tithes demanded; which is evidence of enjoyment, which is proof of an endowment, which is a title to tithes in kind. It is not necessary to go farther in this cause, in which there is a great body of evidence of an endowment, than to determine, that the evidence of

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the payment of compositions in the several townships is admissible evidence of an endowment. And so far I think we steer clear of all the authorities which have been cited.

It was much urged to us upon the evidence, that the vicar was to be considered as endowed of a portion only of the hay-tithes of this parish. But, unless there were evidence of the rector or some other person dividing this species of tithes with the vicar (the contrary of which is in proof) there seems to be no reasonable ground for narrowing the endowment, which, in respect of all the other tithes payable to the vicar, is undoubtedly general throughout all the townships.

The vicar having proved his endowment, the defence which the defendants have insisted upon falls next under our consideration.

[1075] And first as to the defendants, *Oxton* and *Healing*, who are occupiers of all the lands within the township of *Nether Poole*, against whom an account is prayed of tithe-hay and small tithes. These defendants claim to be entitled to the tithe of hay, hay-grass, and agistment of the lands in their occupation under the *Poole* family, who derive, as is insisted by the answer, from *Hugh Cholmondely*, grantee of the crown of the rectory of *Eastham* formerly called the rectory of *Sutton*, and parcel of the possessions of the abbey of *St. Werburgh* in *Chester*, which has since been conveyed in parcels to different persons. And the defendants claim to be exempt from the payment of all other small tithes and vicarial dues upon payment of a *modus*, pension, or immemorial annual payment of 40s. out of the demesne lands of *Netherpool* in lieu of all small tithes, oblations, and other dues. In support of the title to the tithe of hay, hay-grass, and agistment, relied upon by the defendants, it was stated, that the family of the *Pools* were the inappropriate rectors of so much of the rectory as extends through the *Pools*; that of common right the *Pool* family were therefore entitled to all tithes whereof the vicar was not endowed, and that the retainer of the tithe-hay in kind in *Netherpool* was a clear proof that the vicar was not endowed with tithe-hay in *Netherpool*, and that that tithe belonged to the rectory. It turns out in proof that the estate of the *Pool* family was never parcel of the possessions of the abbey: no conveyance has been shewn of any part of the rectory from the *Cholmondeley* to the *Pool* family, nor do I recollect a tittle of evidence in the cause of any part of the rectory being in the *Pool* family before the year 1752, except the fact of their retaining the tithes of hay for *Netherpool*, and the tithes of corn and grain in *Overpool*. There is in evidence a conveyance in *October* 1752 of a rent of 20s. issuing out of the manors, lordships, or townships of *Overpool* and *Netherpool* in lieu of tithes in those townships. This conveyance goes a considerable length towards proving that the

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rectory even as to *Overpool* and *Netherpool* is yet in the *Cholmondeley* family, or at least was in them so late as the year 1752, up to which time they received an annual payment in lieu of tithes out of both townships; and that accounts for the *Pool* family retaining the tithes of the rectory up to that time upon the ground of composition, not title; and one rent issuing out of both townships in lieu of tithes in both townships without distinction affords neither proof nor presumption that the rector is entitled to different species of tithes in one township and the other. And as to the retaining of the tithes of hay in *Netherpool*, the *prima facie* evidence arising from that is fully rebutted by the general evidence in the cause, that the rector is entitled to the tithe of corn and grain only; that the vicar is entitled to tithe of hay; that he does in fact take it in kind in *Overpool*, and that he receives a composition for it in *Netherpool*, which alone accounts for the retainer. We are of opinion therefore that these defendants, *Oxton* and *Healing*, have totally failed in their proof of title to the tithe of hay, hay-grass, and agistment; and therefore the vicar's endowment being proved, if there were not any more in the cause, it should seem that the vicar is entitled to a decree of an account for these tithes in kind. As to the *modus* set up by these defendants in lieu of small tithes, oblations, and other dues, it is agreed on all hands that no tithes in kind have been received by the vicar from *Netherpool* within the memory of the witnesses; that there has been a composition paid to the vicar by the occupiers of *Netherpool* in lieu of something: the parties differ as to the *quantum* of the composition, to what it has extended, and upon the question, whether it is binding or temporary, in respect of the proportion it bears to the real value of the tithes. Upon that *quantum*, the plaintiff's witnesses say, the keep of a horse or a cow is a part of the composition, which two witnesses upon the part of the defendants deny, and state to be merely gratuitous. And whereas the answer sets up this composition as a *modus* in lieu of small tithes; the witnesses on both sides agree, that the composition is as well for hay, hay-grass, and agistment, as for small tithes: and there is some slight evidence that it does not extend to fees for burials, marriages, &c. What the composition is, and to what it extends, must be settled before we can reach the question of the rankness of it: and this, as Mr. *Maddox* for the defendant truly observed, is not properly matter of law, but of argument inferring fact. These are questions therefore proper for an inquiry before a jury, and they will be all open to discussion upon an issue: and therefore we incline to direct an issue upon the *modus* pleaded, with liberty, as usual, to indorse the *postea*; and we are of opinion that the direction upon the other part of these defendants case should be reserved till after the trial of this issue. It was with a view to

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this I said if there was nothing more in the cause there ought to be a decree for tithes in kind of hay. The finding upon the issue directed may have an important effect upon the other part of the case. If upon the finding it should appear, that the defendants have mistaken that part of their case, but that there is in fact a good *modus* which covers all the tithes demanded by the bill, which without prejudice to the argument upon the rankness stands in point of fact confessed upon the plaintiff's own evidence; it will be to be considered, whether the court is so entangled in its forms as to be obliged to decree an account of tithes in kind against the truth and justice of the case. The counsel for the defendants have pressed for an issue, whether the vicar is entitled to the tithes demanded: but as we are satisfied with the evidence of the endowment, which distinguishes this case from that of *Carte* and *Ball*: we think the issue ought to be upon the *modus* and not upon the endowment.

The defendant *Whitehead*, whose case is next to be considered, is the occupier of five tenements in the township of *Little Sutton*, three of which he is also the owner of. He by his answer states the township of *Little Sutton* to have been parcel of the possessions of the abbey, and to have been granted to *Hugh Cholmondeley*; that the grantee enjoyed the tithe of corn and grain and hay through that part of the township which was not demesne: that the purchasers of estates sold off by *Hugh Cholmondeley*, and the defendant amongst others, purchased all the tithes of hay, hay-grass, and agistment of their estate, and have ever since enjoyed those tithes; and so in an awkward manner he derives a sort of title in himself to the tithe demanded in respect of three tenements; and in the owner of the other two, of which he is only the occupier. This defendant also states a tilth-penny to be payable to the vicar of *Little Sutton*, but does not apply it to the tithe of hay. Without resorting to the act of parliament of 6 *Geo. 2.* read in evidence, which makes it impossible that the defence should be true, upon the rest of the evidence there is so little colour for it, that I am surprized to find it stated in an answer taken upon oath. It appears, that the grantee of the lands in this township was also grantee of the rectory, and therefore he enjoyed such tithes as he was entitled to, as rector: the tithes of corn and grain, which are the only tithes which have been in fact collected throughout any part of the parish for the rector, still remain in the rector. *Wecker*, one of the witnesses in the cause, is or was his tenant of these tithes in *Little Sutton*. Defendant *Whitehead* must have known that these tithes were in fact not sold, though I am willing to give him credit for not knowing or not remembering that an act of parliament restrained the rector from selling the tithes belonging to the rectory in *Little Sutton*.

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That the tithe of corn and grain was not sold was enough to put *Whitehead* upon his guard not to hazard an assertion that the tithe of hay had been sold, without first informing himself whether there was a probability or a possibility of its being true. The language of the answer betrays a consciousness of the fact of the tithes belonging to the rectory never having been sold: for the answer states the grantee to have enjoyed the tithes of corn, grain, hay, hay-grass, and agistment; and then states that he purchased the tithes of hay, hay-grass, and agistment, taking no notice of the tithe of corn and grain, nor attempting to account for the selling off the tithe of hay, and reserving the other tithes. Now what is the evidence offered by this defendant of his having purchased these tithes, or of any other purchaser of estates in this township having purchased them? It was observed by Mr. *Skynner*, that he had not even produced his own purchase-deed as an apology for his answer. He has not made it appear that the grantee ever took upon himself to convey this species of tithes with any one estate within the township. Comparing the answer with the proof, the whole is a piece of sophistry built upon the single fact of tithe-hay in kind having never been collected in the township in the memory of the witnesses. Not having been collected, it was retained; being retained, it was enjoyed by the purchasers of the estates: if so, it must have been purchased with the estates of the grantee: and if the grantee sold it, he must have had it to sell. But, unfortunately for this argument, all the witnesses apply the tith-penny, which the defendant acknowledges has been paid to the vicar in *Little Sutton*, to the tithe of hay; which accounts for the tithe of hay never having been collected in kind, and at once refutes the whole argument. Mr. *Whitehead's* defence being thus clearly falsified, we are of opinion that he must be decreed to account for tithe of hay in kind and with costs. If it should be objected that here likewise the plaintiff has shewn that there is a *modus* payable in lieu of tithes of hay, and therefore he ought not to recover tithes in kind against his own shewing, though the defendant has failed in the defence he has set up; I answer, that it will be sufficient for the present to say, that the fact of the payment of this pecuniary composition, which is called a *modus*, being established with little or no contrariety in the evidence, and it being objected to as a *modus* upon a ground of law and not of fact, it is now ripe for the opinion of the court, and it so happens, that we are called upon to decide upon it in the case of another defendant; and, consequently, then will be the proper time to dispose of this objection.

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The defendant *Davis*, whose case comes next in order, is the occupier of three tenements in the township of *Great Sutton*; and he states the same sort of title to the tithe of hay, hay-grass, and

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agistment, in the owners of those tenements, as *Whitehead* has set up in the owners of estates in *Little Sutton*. Upon the evidence *there is this difference between the two cases. The tithes belonging to the rectory in *Great Sutton* have been sold to the purchasers of estates there. But it is in evidence that these tithes were collected before they were sold: that tithes of corn and grain only were received or even demanded by the rector; and the evidence to the tith-penny is the same here as in *Little Sutton*. Under such circumstances, if the impropiator had taken upon himself to convey tithe of hay to the purchasers of the estates in *Great Sutton*, they could have taken nothing under the conveyance: but in this respect *Davis* is in the same case with *Whitehead*; he has offered no evidence of any such conveyance: therefore as the objection in the case of *Whitehead* applies to this defendant, he must be decreed likewise to account in the same manner. The defendant *Bateman* is occupier of a farm inclosed from the Waste of *Great Sutton* in 1735, and as I take it, now belonging to the *Cholmondeley* family, who as rectors are entitled to the tithes of corn and grain arising thereon. This defendant claims to be entitled to tithe of hay, hay-grass, and agistment, upon the same ground of enjoyment of these tithes by the grantee of the abbey, as has been insisted upon by the other defendants. This defendant had less to prove than the other defendant, for he is not incumbered with a proof of a purchase of the tithes from the grantee: but he fails totally in the proof which was necessary for him to make in common with the other defendants, namely, the fact of the enjoyment of this species of tithes by the grantee, and therefore he must stand or fall with them. And in this case there is no colour of objection to the plaintiff's title to recover, except the general objection of a defect of proof of an endowment; for the tith-penny could not possibly be made to apply to this case of a new inclosure. Some stress was laid upon the words "tithe of hay" having crept into a mortgage made by some of the *Cholmondeley* family, which, it was said, brought this case within the principle of the case of *Fanshaw* and *Rotheram* before my Lord Northington. But it was satisfactorily answered at the bar, that the language of a mortgage-deed, not followed by possession or evidence of enjoyment, could in no case avail in the least; and that nothing could be more unlike the case of *Fanshaw* and *Rotheram*, where there was evidence of a long uninterrupted possession and enjoyment under a series of family settlements: so that as to this defendant, he must account likewise with costs.

Infra 1177.

I come now to the case of the defendant *Maddock*, who defends separately.—He is an occupier of land in the township of *Whitby*: [1080] he has taken up the defence which two of the three last-named defendants have rejected. I mean, the *modus* of a penny called the

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tilth-penny. He states, that in the township of *Whitby* there is a *modus* of a penny called a tilth-penny in lieu of the tithe of hay for every ancient tenement payable by the occupier at *Easter*; and he states the lands in his occupation, consisting of five closes, to have been parcel of such ancient tenements as have immemorially paid a tilth-penny. There is some evidence on the part of the plaintiff to show, that two of these closes, that is, *Mudwell* and *Long Croft*, were parcel of ancient tenements belonging to houses situate in that part of *Whitby* which is in the parish of *Stoke*; which *Maddock* admits are to pay tithe of hay in kind. But the weight of the evidence is, they are part of *Robinson's* and *Salmon's* two tenements, belonging to houses situate in that part of *Whitby* which is in the parish of *Eastham*. The case is therefore brought fairly to the point upon the *modus*, whether there is such a *modus* as the defendant has set up. One witness only, *Anne Charmley*, speaks to the tithe of hay in kind having been rendered to the vicar in *Whitby*; and that is a single instance only, viz. for the *Inn Jack*, part of *Edwards's* tenement: all the rest of the witnesses and several terriers agree, that no tithes in kind have ever been paid. The terriers say, *Whitby* is freed from the tithe of hay by the payment of a tilth-penny for every house. The witnesses say, that a tilth-penny was payable in lieu of the tithe of hay by the occupier of each farmhouse having lands holden therewith. One witness, *Robert Hayes*, in another part of his evidence, adds, that he understood the tilth-penny to extend to cover fields anciently belonging to ancient farmhouses: his evidence goes to support the *modus* laid by the defendants for specifick lands. But he is not supported in his understanding of the *modus* by any of the other witnesses, and the whole tenor of the evidence is against it, and determines the payment of the tilth-penny to be for lands occupied with a house without specification more or less. *Critchley*, one of the witnesses, says, that the lands which formerly composed the tenements within those townships where the tilth-penny is paid, lie intermixed, having been taken from one farm and added to another, so that no body but one intimate with the whole town, or who has lived a long time therein, can give so perfect an account as could have been given, when the tenements were holden separate. It is in proof, that *Maddock* and the other two defendants, *Whitehead* and *Davis*, all held three or more tenements which the witnesses remember to have been holden separately, for each of which when holden separately a tilth-penny was paid. And yet *Critchley* says expressly, that he collected one penny and no more, as the tilth-penny from each of those defendants; plainly, because he considered the *modus* as payable for the lands holden with a farm-house indefinitely, and not for specifick lands. The same witness says, if a considerable part

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of the lands belonging to a farm-house were taken from it, and added to another farm; yet if any land besides a garden-spot was left and was mowed, he continued to collect the tilth-penny. This pursues the same idea of a payment for lands more or less. It is in proof that in all the townships there are houses which have now no lands belonging to them, but formerly had lands, and paid the tilth-penny. The decrease of houses having lands within the memory of the witnesses is stated. In *Whitby* they are decreased from 14 to 9; and *Critchley* says he collected only nine tilth-pennies. In *Great Sutton* they are also reduced from 14 to 9; in *Little Sutton* from 18 to 8: and no witness speaks of more than one tilth-penny paid by the occupiers of any of the consolidated tenements. An argument was drawn from the names of the tenements continuing the same for a great length of time: but those names did not appear to be of any antiquity; many of them being the names of the tenants whom the witnesses remembered to have first occupied them, and the preserving of the names of former occupiers is in great measure accounted for by the usage in the parish to rate to the church-ley, as it is called, by tenements.

Upon the whole, therefore, there seems to be no doubt as to the fact of there having been a usage to pay a tilth-penny for every house having lands belonging to it, without specification or regard to quantity. There is as little doubt that this usage is different from that which is laid as a *modus* by the defendant *Maddock* for specifick lands composing an ancient tenement. Notwithstanding which, if the usage which is proved could be supported as a *modus*, we should not incline to decree an account. Not that the cases cited in prohibition stand in our way, (for in prohibition it is always a question of jurisdiction; and any thing that shews that the ecclesiastical court ought not to have that jurisdiction is sufficient to refuse a consultation:) but, because the reasoning which weighed with us in the case of *Oxton v. Healing*, would also govern this case.

[1082] This consideration makes it necessary to inquire into the legality of the *modus* proved. As to which it has never been contended, that such a *modus* could be supported. But the counsel for the defendant assuming against the clear result of the evidence, that the *modus* proved was for specifick lands, have argued that the severance does not destroy the *modus*; that it is not necessary that all should remain in one hand; that every man who holds a part is liable, as in the case of a rent-charge, and that it is sufficient that the vicar is not without his remedy. All which is very true, and would be to the purpose, if the *modus* were as they state it. But it being clearly otherwise, and being a recompence for a tithe wholly uncertain, fluctuating in its amount, shifting according to the changes in the occupation of lands, to be reduced to a

single penny, if not to be wholly annihilated, it seems impossible to support it. This is so clear upon principles, I need not look for authorities. However, the case of *Turton v. Clayton*, of which there is a loose note in *Bunb.* 80. * seems to be in point. A hay-penny, say the court, is unreasonable, for if a man has 60 acres of hay, he pays only one penny; and if he lets them to 60 several persons, they shall pay one penny a piece. The converse of the proposition would have put the unreasonableness in a stronger light, and would be exactly the present case; that is, if 60 persons pay each one penny, and they let their land to one, one penny only shall be paid. And in fact this defendant, *Maddock*, appears in 18 years time to have consolidated so many tenements or parts of tenements in the township of *Whitby* as have increased his rent from 4*l.* to 170*l.* If this *modus* cannot be supported, there is nothing in the way of the account prayed by the bill against this defendant, and also against the other defendants, *Whitehead*, *Bateman*, and *Davis*, who are occupiers of lands in those townships in which the usage of the tilth-penny has prevailed, against whom I have already stated there must be an account unless this *modus* can be supported. And therefore upon the whole the directions are, that the parties go to trial of the issue upon the *modus* set up by the defendants, *Oxton* and *Healing*, with liberty to indorse the postea as usual, and that there be an account decreed for tithe-hay in kind against *Whitehead*, *Bateman*, and *Davis*, with costs. As against the defendant *Maddock*, inasmuch as he has set up a defence as fairly as he could do to make a tolerable case to give him a chance of success upon a true ground of defence, that is, that no tithes in kind have been received; we think he had a good colour to make the defence he did, and as to him the decree ought not to be with costs. It is my duty to observe, though my Lord Chief [1083] Baron and my brothers have agreed with me in the decree we are to pronounce, I alone am answerable for, I am afraid, many errors and mistakes which may be found in the reasons which have been drawn up during the course of the sittings in a hurry; therefore I am bound to take them upon myself. You will try the issue at *Shrewsbury*.

The defendant *Oxton* and others, on the 23d of *January* 1777, the defendant *Whitehead* being dead, petitioned for a rehearing; and it was on the same day granted, upon the defendant's making the usual deposit.

The plaintiff revived the suit against the executors of *Whitehead*; and on the 16th day of *April* 1777, on the application of the executors, the original cause was also ordered to be reheard as to them.

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The cause came on accordingly to be reheard; and upon hearing counsel several days, and reading the proofs and exhibits which had been read on the former hearing; and on reading, on behalf of the plaintiff, two terriers of the parish of *Eastham*, remaining in the consistory court of the bishop of *Chester*, the one of them taken in the year 1696, the other in 1709, and the following additional evidence on behalf of the defendants, that is to say, several depositions taken in the cause; an exhibit marked L being by an order of the court to be produced at the rehearing, viz. "A table of tithes due in the parish of *Eastham*, accordingly "as they have been formerly received by *William Seddon* and "*George Beckett*, vicars of the parish of *Eastham*;" in which was the following clause, viz. "*Easter* dues in *Whitby* and the two "*Suttons*; no hay; no tithe-calves; no mortuaries; only a penny "a cow; and from every house a tilt-penny;" the cause was ordered to stand over; and on the 1st of *July* 1777, the judgement of the court was delivered.

MS.

Lord C. B. *Smythe*. — On the rehearing of this cause, it has been insisted, that the vicar's right to the tithe in question does not sufficiently appear; and that, in all cases, the vicar's right, if disputed, ought to be tried at law.

[1084]
Supra 797.

There is no such rule in a court of equity that all disputed facts should be tried at law; where indeed there is a contrariety of evidence, and a doubt is created in the court, there, it ought to be tried by a jury. In the present case, it is proved, that the impropiators receive tithes of corn and grain only. If the impropiators demanded the tithe in question, it ought to be tried at law: that was the case of *Carte v. Ball*. In this case the issue already directed must be tried. The tilt-penny is not insisted upon as a *modus* by the defendants who have reheard the cause. The tithing-table speaks of the tilt-penny as paid for hay, not as a *modus*. This cause is merely for a subtraction, not binding any right; and as I am satisfied with the vicar's right as proved, I think no issue ought to be directed to try it.

Eyre B. said, he had given his opinion fully before, and saw no reason to change it; and therefore declined giving his reasons.

Hotham B. said, he was not present at the former decree, and therefore would give his opinion. — "It has been said that the court of Exchequer has not an original jurisdiction in cases of tithes, but that it is only incidental and collateral as to discovery and account. But it is to be recollected that there is a marked distinction between the court of Chancery and the court of Exchequer. The court of Exchequer is a court of revenue, as well as a court of equity; and, as a court of revenue, it had always an original

jurisdiction over tithes. Tithes were always part of the possessions of the crown; and it is the peculiar duty of this court to protect such property as belongs to the crown. From the earliest reports or records of law, it appears that the court of Exchequer have uniformly exercised this power over tithes; and even were the point problematical, the constant practice of the court for so many centuries would now warrant the exercise of such immediate and absolute jurisdiction. This is merely a case of subtraction: the rector does not claim, nor ever seems to have claimed. In *Carte v. Ball* the rector actually claimed, and therefore it was proper to try the right by a jury. A *modus* is often allowed without a trial; and yet in a case of subtraction, that is a decree on the right. It is objected that the vicar has not stated his evidence. It is not necessary to state it. The question then is only, whether it shall be tried at law. As to *Oxton* and *Healing* an issue is directed; and in such a bill as this, I think it not necessary to try the right of the vicar. It appears to me sufficiently from the evidence in this cause, that the impropriators have not received tithe of hay, and that the vicar has. *Lloyd v. Mortimer* proves, ^{Supra 1060.} that payment of tithe in one part of the parish is evidence of right to it in another. There is no doubt that the tilt-penny is paid for hay; the natural construction of the tithing-table is, that the tilt-penny is paid for hay. I think the decree ought not to be varied in part."

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Perryn B. having been counsel in the cause for the defendants [1085] declined giving any opinion.

The court therefore ordered the decree to be affirmed.

From these decrees the defendants appealed to the House of Lords, for the following (among other) reasons:

1. That although a rector, whether lay or appropriate, is entitled to tithes of common right, and, on a bill brought by him for tithes, has nothing more to prove than that he is rector; and it is incumbent on the defendant to prove an exemption or discharge, or a title to the tithes; yet the case of a vicar is totally different; and it is as clear and settled a rule, that when there is a rector, *prima facie* all the tithes in the parish belong to him, as that in order to support a bill by a vicar for tithes in kind, he must prove his right to such tithes, which must be either by showing an actual endowment, or by prescription or usage.

2. That the respondent in this case has not produced or proved any actual endowment of the vicarage, nor has he given any evidence of the taking or receipt of any tithe-hay in kind, in the said townships of *Great* or *Little Sutton*, by any of his predecessors; but the only evidence on which he founds his claim to the tithe of hay from the appellant's several farms, is, the payment of the

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said penny, called a tilt-penny, which some witnesses (who are all common country people) for the respondent have said, they were informed or they believed was paid for tithe-hay, but in a very vague and partial way (often observable in depositions), and without giving any reasons for such belief, or saying how or by whom they were so informed, and so as not to be admitted as legal evidence; that by such sort of oral testimony, the respondent endeavours at this day, after an immemorial enjoyment to the contrary, to apply the tilt-penny as a payment for tithe, and yet in a manner not to be good as a *modus*, but still as evidence to supply the want of endowment and enjoyment, and by such means to come at the tithe-hay in kind from the appellant's farms, though it appears by the tithe-table, which was in the respondent's power, that the tilt-penny was from every house; and the respondent not having alleged or charged any thing in his bill relating to the said tilt-penny in any manner, it was impossible for the appellants to give any answer to such his evidence, or to examine any witnesses to contradict it, or to cross-examine the witnesses produced by him, or to say any thing relating thereto. And the evidence produced and read by the respondent in support of his claim, and relating to [1086] the tilt-penny, was much too loose and inconclusive for a court of equity to make a decree in favour of the respondent, a vicar, in the first instance, for payment of a tithe in kind, against common right, and which neither he, nor any of his predecessors, had ever before taken, enjoyed, or claimed, and particularly so, as no evidence ought to have been suffered to have been read to matters, which were not charged or alleged by the bill, or in issue between the parties in the cause.

3. That the claim to tithes is, in its nature, a legal claim, and the right to tithes a legal right; and in the case of a bill filed in a court of equity by the respondent, a vicar, for the payment of tithes in kind, and the vicar's right to the said tithes being denied by the defendant's answer, and the evidence proving that he never had enjoyed or received the tithes demanded, and he having given no clear evidence of his right thereto, it is submitted by the appellants, that a court of equity (which has no original jurisdiction in matters of tithe, but gives relief in consequence of the account prayed) ought not, in the first instance, to have decreed in favour of the respondent, and thereby (in effect) established his right; but ought either to have left him to his remedy at law for the recovery of the tithe of hay, or have directed an issue to try whether the respondent, as vicar of *Eastham*, was or was not endowed of the tithe of hay; upon which issue, and a *viva voce* examination of the witnesses, the question would certainly be better and more fully discussed and decided, than it could be by the court of Ex-

chequer upon the depositions; and when the most material part of the evidence was taken and received, it was impossible, as before mentioned, for the appellants to give it any answer.

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4. That besides the aforesaid reasons, it is an additional objection to the decree, as to the relief given against the appellant *Elizabeth Bateman*, that the farm occupied by her has not been inclosed from the waste above forty years; and therefore there could be no pretence that the penny called the tilt-penny was in respect of that, and, consequently, no satisfaction whatsoever could be pretended to have been ever paid in lieu of tithe-hay of that farm, and the respondent had no evidence in support of his right to the tithe-hay arising thereon.

5. That it is certain, that the appellants and the former occupiers or owners of their farms, have, from time immemorial, invariably taken and enjoyed the hay arising therefrom for their own use, without paying any tithe thereof; and it never was conceived by any of them that they paid any satisfaction for the [1087] same; and therefore the appellants humbly insist, that, in favour of such long enjoyment, a grant of such tithe-hay ought to be presumed by every court of justice to have been made by the person or persons capable of making the same.

6. That for the reasons aforesaid, and as the claim to the tithe of hay in kind, made by the respondent, was never made by any former vicar of the parish, nor by him until several years after he became vicar thereof; and as the appellants did no more than defend what they apprehend they have a legal right to, and preserve the ancient usage in the parish; they humbly apprehend that the court of Exchequer ought not to have decreed them to pay the respondent the costs of the suit.

On the other hand the plaintiff, in affirmance of the decrees, urged the following (among other) reasons:

1. Because the defence of the several appellants stands clearly falsified in every material point, the executors of the late *William Whitehead*, in particular, being now presenting this appeal in direct opposition to an act of parliament, which makes it impossible that the defence of their testator could be true.

2. Because the tilt-penny *modus*, proved in the cause, was objected to in the court below, on the ground of law, and not of fact; and therefore was ripe for the judgement of the court.

3. Because no length of time can give sanction to a bad *modus*.

4. Because an appeal, like the present, following two hearings, in the court below, of ten days' continuance, and two unanimous decrees in that court, after six months' mature deliberation, in favour of the respondent, seems (not so much to bespeak the efforts of parties presuming themselves injured, and seeking redress, as)

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to betray the determined purpose of a powerful combination, proved in the cause, to harass, and, if possible, to destroy an unsupported individual.

On the 26th of *January* 1779, after the arguments of counsel had been heard at the bar of the House, Lord *Mansfield* spoke as follows :

Sir J. Mit-
ford's MSS.

[1088]

“ My Lords, This question has taken up some days of your Lordships' time. It takes its rise from a bill filed in the court of Exchequer by the respondent, who is vicar of the parish of *East-ham*, against the occupiers of land in that parish ; and in that bill he states, that he is endowed of tithe of hay and small tithes throughout the parish. He states that these tithes have been subtracted, some by some occupiers, and others by other occupiers : that some of the occupiers have subtracted the tithe of hay for one year, and others, who are not now before this House, have subtracted the payment of small tithes for one year ; and he prays an account, and payment of such tithes, your Lordships will observe for one year only. He does not suggest that there is any question of right whatever : he does not suggest that there is any dispute upon a question of right ; he does not suggest that any *modus* is pretended : he does not make the impropriator a party ; but brings his bill upon a clear case of endowment only for non-payment of tithes of hay in kind, and that for one year only ; so that it comes into the equity side of the court of Exchequer for consequential relief, on a clear legal right, which is to discover the quantity and value of the tithes so subtracted, and to obtain the payment of them. To this bill the defendants answer. They say, he is not endowed of tithe of hay, but that tithe of hay belongs to the impropriator ; that they have purchased, as to their own lands, the tithes of hay in *Great* and *Little Sutton* ; that they purchased them from the impropriator, they having been immemorially enjoyed with the lands ; and that is the way in which they claim to have purchased them. They say, that a *modus* of a penny a house is paid. This is awkwardly stated in the answer, but they believe a penny a house is paid (called the tilt-penny) for all small tithes not paid in kind.

Upon these pleadings the parties go to proof. In their examination the appellants do not prove that they have purchased the tithe-hay of the impropriator, otherwise than as they have purchased the lands in *Great* and *Little Sutton*, (all which townships were in the abbot of *Chester* the appropriator), and that the lands are free from tithe-hay, by immemorial enjoyment therewith. And that is the way they say they have purchased these tithes ; in no other sense have they purchased them. As to this penny payment, they prove nothing as to its being a pension ; they prove nothing as to its ever being paid as a *modus* or composition for small tithes ;

they give a sort of evidence as if the impropiator at least claimed the tithe of hay, because they produce from the beginning of 1690, odd, a series of mortgages, in which tithe of hay is alleged as a part of the security. But it comes out in the proof without contradiction, that beyond the memory of man or writing no tithe of hay was paid to the vicar from the hamlets of *Great* and *Little Sutton*; and it comes out by an exhibit made above a hundred years ago, because it is a table of the payment of tithes and vicars [1089] dues in the time of the two vicars mentioned; the first was vicar in 1637, the last in 1667, and he died in 1692 or 1693; therefore it is near a hundred years ago since the time of his death; there, the memorial is, "No tithe-hay is paid." This comes out in evidence. But the plaintiff, the vicar, has examined many witnesses, and produces many exhibits, by which he thinks this proposition is manifest; that the manner of paying the tithes in these townships was by paying a penny a house, called the tilt-penny, as for hay only; that this manner of payment was such as by law never had a legal existence, because it is unreasonable, and never could arise from any contract; that having been erroneously paid, though it might be paid by voluntary agreement, yet, unless it is such as may be presumed to have had a legal beginning, it does not bind beyond that consent: therefore he contends that by his evidence he has proved that this was the mode of paying the tithe of hay; that by law it cannot be supported as a *modus*; therefore it must have been by agreement, and the consequence is, that he must have been endowed of the tithe of hay in kind, or he could not have received this *modus*, which he so contends was for hay.

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Upon the hearing of the cause the court of Exchequer are of opinion, and they decree, the vicar an account of the tithe of hay; and in that decree they virtually determine these points: they determine, that in fact it was sufficiently proved to their satisfaction, that the manner of paying tithe of hay in these townships was by a penny a house: they determine, if the fact was so, that that payment never could have a legal beginning, and therefore was void in law: they determine, that though it was erroneous and void, it presumes the endowment of tithe-hay as much as the payment of tithe-hay in kind could have done: because the impropiator could only give the tithe to the vicar; therefore they have holden, that that payment proved the endowment; they have holden farther, that in proving such an endowment (though the case of a vicar is very different from that of a rector) by law he was entitled to the tithe of hay in kind, as in the case of a rector. The defendants contended on the bill, as they do now on their appeal, that the court ought not to have made that decree without having the right of the vicar legally tried; that the cause ought to be sent to

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 * [1090] a jury on the right of the vicar. The court were of a different opinion, and upon the hearing, and at the rehearing, they unanimously *made an immediate decree. From that decree there is this appeal to your Lordships, and the single point on the appeal is, that there should be an issue to try the legal right; that the issue should be directed to try, whether the vicar was endowed of the tithe of hay. This the appellants argue on two grounds: 1st, That the conclusion does not follow, supposing the fact to be true, which the vicar contends for, that a penny was paid for every house as for hay. 2dly, By the rule of the common law a vicar claims by his endowment: he receives here a pecuniary payment of which he was endowed in lieu of tithe, and such endowment was of the money. Upon that part of the argument, if the case rested there, as to the endowment being of money in lieu of tithe, I do not at present see any ground to differ from the court of Exchequer. It is well known, that in more ancient times, whenever there was an appropriation of lands to a religious house, there was a perpetual vicarage, and that vicarage was to be endowed. There were three ways in which a religious house that had the land appropriated to them, (and it often happened that they had the property of the greatest part of the lands), there were three subjects with which the vicarage might be endowed. It might have lands by way of agreement: it might have a pension by way of charge issuing out of the religious house: if they gave a pension, they did not give the tithes; and if they gave the tithes, they did not give a pension. Another way of endowing was with a parcel of the parsonage, with all the small tithes, or tithe of hay, perhaps tithe of corn, particular parts of the great tithes. But when a pension is given, (and there great confusion, in my apprehension, has arisen in the argument), they say that money was given instead of the tithe: it is incorrect, for it is money given, and no tithes. It is impossible to give money as a satisfaction for tithes: money is given and no tithes. The vicar, they say, had such an annual sum of money instead of tithes; no, the impropiator gave him no tithes there, but money only. Where there is a pension, if this is a pension, it is no argument of the right to tithes in kind. A religious house could not endow a vicar with tithes in kind, and then make an agreement with him that those tithes should be paid in a manner contrary to law. They shall not give him tithes, and then say, he shall take them in a way the law says could not have a legal beginning. The evidence of the payment of money in the lieu of tithes is then an evidence of the endowment of the tithes. What Mr. Mansfield [1091] says has weight on that question, that where a *modus* is set up in an answer to a bill brought by a vicar, and that *modus* is con-

demned on the face of it, the vicar has a right to the tithes in kind, because it is evidence of the endowment of the tithes. Who is to have them? they cannot go to the rector, he has given up all right to them. Who is to have them, but the vicar? Therefore I am not inclined to differ from the court of Exchequer on that point, because it would be attended with bad consequences in all bad *moduses*, that are so pleaded.

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Oxton.

There is another ground on which the defendants contend there should be a trial at law, that is, with regard to the fact itself, whether this penny has been paid and received as a manner of paying tithes of hay. There are many arguments which seem to have very great weight, and deserve your Lordship's serious consideration, whether that ought not to be tried, and whether a court of equity has a right to decree upon depositions. I must just sum them up to your Lordships.

The first is, the nature of the claim. It is a claim against immemorial possession and enjoyment, and it is to overturn property which people have thought themselves secure in now beyond all memory of writing or man. That is a very unfavourable claim, and a claim that every court of justice would greatly discountenance. It is a right, a legal right; and a court of equity cannot set aside or decide as to the consequences of that legal right; to determine a right against constant possession, — to determine a right against constant usage, against constant enjoyment. There is nothing courts of justice cannot presume in favour of possession. Possession is every thing; — estates are bought by it. — Such a claim is always reprobated. — But here, a court of equity, on a question arising on a legal right, proceed in the first instance to determine it, and to make a decree.

There is another right which they go upon for the respondent, which is the medium by which he endeavours to shake what has been quiet for centuries, that is, a penny has been paid for every house and for hay. Yet it is immemorial usage. The written testimony is rather dark and wants clearness, as to the nature of the practice upon it, arising from what witnesses say, whose testimony is never taken down in written depositions, as it is in evidence in open court *viva voce*. But if there is any thing uncertain in matters of right, it is of course to be tried by a court of common law; and in a variety of cases where it is on such a right, the counsel do not read their briefs, there must be an issue of course.

I now proceed to consider the nature of the evidence. It is not [1092] because the weight of the evidence is on one side or the other, that the right is to be determined by a court of equity. I know no case where a court of equity decree on a right that they do not go on this ground, that it is clear *beyond contradiction, and without a pos-*

1775:

Travis
v.
Orton.

sibility of its being otherwise. But there is a leaning in all juries to determine against tithes: therefore there are many precedents, where upon the evidence coming home quite clear upon a *modus* set up or a right, a decree has been made without sending it to a jury.

I shall now consider what objections have been made to this evidence. In the first place as to the negative evidence, that the impropriator has not now the tithes, I think it by so means proves it; it is very equivocal, for the impropriator was the owner of all the lands in *Great and Little Sutton*: no tithe-hay has ever been paid; none, because the lessees and purchasers occupied it themselves with the lands. It is to be supposed, that when he lets them to his tenants, the impropriator lets them tithe-free at greater fines or rents; therefore it does not follow but that originally tithe-hay might have been paid in kind to the impropriator. The arguments from the parliamentary survey do not at all conclude by any means, and therefore that is not decisive to prove, that they did not pay such tithes. The next thing is upon the nature of this payment. They say for the respondent, a *modus* is paid by every house for hay. It is a very extraordinary payment, very difficult to conceive. What, a penny a house for hay! Is hay made in the house, my Lords, or spent in the house? A smoke-penny, or a hearth-penny for a house is very natural and well understood, my Lords. Now what says the written evidence? there is not one piece of it that states what the *modus* is for. The table of fees and the two terriers are produced. What is the fact? why expressly, that no tithe of hay is paid. The fact is, a penny is paid, but for every house; for what else the penny is paid, or if for any land, or on what account, they do not say. But the terriers, which is very remarkable, of 1696 and 1707, say free of tithe-hay; but a penny is paid for every house, and then they say (at that time) "on what account we know not." It is paid by every house, but they pay not hay: what is covered by the penny we cannot tell. And next comes the parol evidence. And here some of the witnesses say, it was paid for land occupied with the house, were that land more or less, and if there is no land, the penny is not to be paid. Others say, it was paid for ancient tenements, and the land *anciently occupied with those tenements. But there is no certainty from this testimony; and there are other circumstances, my Lords, that weigh a great deal. It is argued, that the appellants were rather surprized (though I do not think they were) as to the house-penny being reputed to be due in lieu of some tithes. I believe they were apprized of it, and were aware that they could not support it, if set up as a *modus*, and therefore did not set it up as a *modus*; for one of the defendants, *Maddocks*, as to *Whitby*, did plead it as a *modus*; and a witness says, that *Whitehead* said, it was paid for

11 Ja. 1.
1614, about
20 years
before the
tithing-table
of 1637
bears date,
it was so-
lemnly de-
termined in
the case of
Dr. Grant,
11 Co. 16.
that an im-
memorial
payment
for a house
was a good
payment in
law and
might be
prescribed
for.

*[1093]

tithe-hay. I do not therefore think the appellants were surprized in that; but I do think they were surprized as to the nature of the claim, and what the vicar meant to offer as proof of the endowment. They plead no *modus*, therefore they had no need to prove a *modus*: the vicar stated no *modus*, therefore they had no need to plead or prove a *modus*; and there they were well advised. The vicar comes here to set up a *modus* to make use of it as evidence of his endowment, and then in his own way to knock it on the head by such his own proof, as illegal, and so to let himself into the tithes in kind. There never existed a case, I believe, in the whole practice of the law, of just such a ground so proved. I do not believe, my Lords, any one remembers a vicar coming to set up a *modus*, and then damn it, as not being a legal *modus*, and thence draw an argument of his right to tithes in kind. There was a stronger case before Lord *Hardwicke* where he decreed on an endowment. It is the case of *Carte (a)*, whose name is very well known as an historian. There was a bad *modus* paid: after his brother's death he brought a bill for the tithes in kind; he had gotten the abbot of *Lyra* to furnish him with the endowment. The occupiers set up a contributory payment to the amount of the *modus* paid out of the lands: one paid 5s., another 6s., and so on, filling up the sum: they pleaded that as a *modus* for all tithes. But upon the evidence my Lord *Hardwicke* doubted whether it was sufficiently proved to have been paid as a *modus*, and that it might be a pension; and therefore he said, he must prove an endowment; and he directed this issue, whether the vicar was endowed of the tithes claimed by the bill. The fate of it was, that he was not endowed. That was a stronger case than the present, because they had agreed in the *modus*.

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Travis
v.
Oxton.

Supra 797.

Now at the bar, and in the court below, no distinction has been made, as to the nature of the issue to be directed, if an issue is to be directed; but it is taken for granted, that it must be on the right of the vicar, whether or no he was endowed. I own I have had great difficulty about it, because I think directing the issue in that form is leaving that to the jury as a matter of fact; if tithes in kind have in any manner *eo nomine*, if they have been paid in any manner, though illegally, it is equally evidence of the right to the tithes, and the necessary consequence in point of law, I should think, is that the vicar must have the tithes in kind, if the *modus* is set aside. Leaving that to the jury, every jurymen may say, the evidence before me is a payment of money; I cannot say whether he is endowed of tithes in kind, I know nothing of the legal consequence. The fact in point of appeal here is, what the jury are not warranted to pay the

[1094]

(a) 3 Atk. 496.

1775.

Travis
v.
Osborn.

least regard to; the case for them to try is, whether the vicar is endowed of the tithe of hay. If there should be a trial on this part of the case, I am not struck with the consequence of it, that it might shake all those cases which are established in the courts of equity, that if a vicar has a *modus* set up against him, that of course there must be an endowment of the tithes in kind to the vicar, after the *modus* is condemned, that they should direct an issue to know whether he was endowed of it, or no; and the counsel say, the practice is so, and here no *modus* is pleaded by the appellants. In my own mind, I think what will maintain the justice of the case is, to direct an issue upon the very fact. *Ex facto oritur jus*; if the fact is determined, the law follows of course; an inquiry being directed on the fact, the fact necessarily involves the law. Courts of justice direct issues for their own conscience to apply it to the fact of the case. What I propose to your Lordships therefore is, to direct an issue to be tried between the parties, whether the tilt-penny paid by the occupiers of houses, within the townships of *Great and Little Sutton*, to the vicar of the parish of *Eastham*, has been paid as a *modus* and composition in lieu of tithe-hay, with liberty to indorse the *postea*. Your Lordships see, in these facts, the respondent is to prove the affirmative: if the appellants can prove that this is a pension, the issue will be with them: if they can prove the money applied to a *modus* as for small tithes, the issue will be with them. The great objection to the issue is, it is to set aside a *modus*, and the occupiers have not stated the *modus*. How was it paid, and for what? is the question. The jury may inquire into the facts, and they will then see, whether it is a good or a bad *modus*; if a good *modus*, the vicar will not have a right to tithes in kind; if it is a bad *modus*, he will have a right. I therefore propose to your Lordships, that the court of Exchequer direct a trial at law in the county of *Chester* upon the following issue, "Whether the tilt-penny paid by the occupiers of the houses within the townships of *Great and Little Sutton* to the vicar of the parish of *Eastham*, has been paid as a *modus* or composition in lieu of tithe-hay, with liberty to indorse the *postea*, reserving all further consideration in the case for an after time."

[1095]

Decree of
the court of
Exchequer
reversed;
issue di-
rected.

Found by
the jury
that a tithe-
penny had
been paid
to, and

accepted by the vicar as a *modus* or composition in lieu of tithe-hay.

It was therefore ordered, that the decree of the court of Exchequer be reversed; and the above issue was directed to be tried at the next summer assizes for the county of *Salop*, instead of the county of *Chester*.

The issue was accordingly tried at *Shrewsbury* at the following summer assizes, when the jury, which was special, found, that the tilt-penny had been paid to and accepted by the vicar in the very words of the issue. The other issue as to the *modus* of 40s. a-year

payable by *Oston* and *Healing* in lieu of the small tithes of the demesne lands of *Netherpoole* was likewise tried at the same assizes, and a verdict was found in favour of the *modus*.

A new trial was moved for on the issue respecting the tilt-penny *modus* and refused; and on 25th Nov. 1779, the cause came on to be heard on the equity reserved, when the court ordered the defendants *Oston* and *Healing* to pay the arrears of the *modus* of 40s. found by the verdict; and on their undertaking to do so, the bill to be dismissed as against them, without costs either at law or in equity: and they further ordered an account to be taken of what was due from the defendants, *Whitehead*, *Davis*, and *Bateman*, respectively for the tithes in kind of hay demanded by the bill, and that the said several defendants should pay what should be reported due to the plaintiff on account thereof, together with his costs both at law and in equity with respect to the tithe of hay.

N. B. When this cause first came on in the court of Exchequer, the defendant's counsel objected that there was a want of proper parties, none of the land-owners, except the defendant *W. Whitehead*, a land-owner as to part of the tenements in his occupation, nor the impropriator being parties to the suit; and that the vicar's right being denied, they ought to have been parties: and in support of this objection the case of *Hooper v. Lethridge*, *Bunb.* 291. was cited. But the court over-ruled the objection; in which opinion *Eyre B.* states, that he agreed singly on the ground of inconvenience. I took it, says he, that though there was no strict objection for want of parties, but the court could make a decree between these parties; yet that the court, if they saw upon the opening or on the suggestion of the defendants, that other parties claimed an interest in the same thing, and that there might be further litigation, did frequently order the cause to stand over, and those parties to be added: that the case in *Bunbury* seemed of that sort: that this being in the discretion of the court, they would consider the convenience and the inconvenience: considered upon the ground of inconvenience and expence, the number of parties to be added, the probabilities of abatements, the connection of the defendants with the parties supposed to be interested, it would be unfit to do it in this case (a).

1775.

Travis

v.

Oston.

MS.

Supra 702.

[1096]

(a) As to the *modus* here set up. See the later case of *Bennett v. Read*, *infra* 1272. Sir Wm. Grant M.R. in *Blackburn v. Jepson*, 17 Ves. 476. *infra*. and C.B. Richards in *Williamson v. Lord Lons-*

dale, 5 Pri. 25. have considered these two cases as irreconcilable. See also *Leyson v. Parsons*, 18 Ves. 173. *infra*.

1775.

M. 16 Geo. III. A. D. 1775. Scac.

White

v.

*Friend.**White v. Friend.*

On a bill
by a rector
for tithes,
the grantee
from the
crown of
certain
lands in the
parish, and
his lessee
are made
parties.

S. C.

4 Wood's
Decr. 44.

THE rector of *Little Mongham*, in the county of *Kent*, claimed all tithes and oblations arising therein.

The defendant *Wyburn* said, that he had regularly every year set out his tithes, and that they had as regularly been carried away by the defendant *Friend*, but by what right he claimed the same he knew not.

The defendant *Friend* said, that during the year 1773 he occupied lands in the parish as tenant to sir *N. Daeth*, Bart.; that sir *N. Daeth* held the said lands, with divers other lands and premises in the said parish, by lease dated the twenty-first of *June* 1771 from the archbishop of *Canterbury* to his father; that all the said premises were formerly part of the possessions of the monastery of *Saint Austin* in or near the city of *Canterbury*, one of the greater monasteries; that the said lands, on the dissolution thereof, were seized into the hands of *H. 8.* and were afterwards by him granted to *Thomas* then archbishop of *Canterbury*, and his successors; that they were holden by the monastery, before the dissolution thereof, freed and exempted from the payment of tithes; that by 31 *H. 8. c. 13.* the said lands were discharged from the payment of tithes as freely and in as large and ample manner as the said monastery had holden and enjoyed the same; and that he had good right, power, and authority to hold and enjoy the same, in like manner, exempt and free from payment of tithes to the plaintiff or any other person whomsoever. He admitted, that he had taken all the tithes which had accrued in the said year, for the said lands in the occupation of the defendant *Wyburn*, which, he contended, he was well entitled to do, they having been for many years past received by sir *N. Daeth* or his ancestors: and he insisted, that if the plaintiff sought a satisfaction for the said tithes, sir *N. Daeth* ought to be a party to this suit.

[1097]

The plaintiff replied; the defendants rejoined; and witnesses were examined on the part of the defendant; and the cause came on to be heard on the 12th of *December* 1775; when the defendant's counsel objected to the plaintiff's proceeding for want of proper parties.

Upon this occasion *Eyre* B. said, that in this case, the want of parties was not strictly an objection; but that, if it was *convenient*, the court would order parties to be added: that he inclined to direct the cause to stand over with liberty to amend, by adding parties without costs.

Hotham B. said, it was *useful* that the cause should stand over in such a case, for the purpose of making a final end.

The plaintiff accordingly amended his bill, making sir *N. Daeth* and the *archbishop of Canterbury* defendants. (a)

1775.

There was finally a decree for an account against *Friend, & Wood's* Decr. 44.

White
v.
Friend

P. 16 Geo. III. A. D. 1776. Scac.

[1100]

Jones v. Pawlett.

THE defendant set up an exemption.

The *Lord C. Baron* said, that if an exemption from payment of tithes is set up by a defendant, he is not bound to set forth the value and quantity of the tithes; but that in case of a *modus*, the value and quantity must be set forth.

Qu. If the defendant is bound to set forth the value and quantity of the tithes where he sets up an exemption.

Perryn B. remembered a case of a bill brought by a vicar: the defendant in his answer insisted, that the rector was entitled to the tithes in question; and the court of Exchequer determined, that he was not bound to set forth the quantity and value; though he seemed to doubt of the case of an exemption mentioned by the Chief Baron. (b)

[1101]

But, in the present case, an exception to the answer had before been heard and allowed; and the same exception was now heard again; and therefore the court thought, that, in all events, the defendant was now bound to answer to that exception; but they thought the answer sufficient, and over-ruled the exception.

H. 17 Geo. III. A. D. 1777. Scac.

Robinson v. Appleton. [MS.]

BILL for tithes.— The defendant set forth a real composition made before the time of queen *Eliz.* between the parson, patron, ordinary, and occupiers, by which an acre was agreed to be paid in lieu of tithe-hay on the lands through the district of *Disforth* in the parish of *Topcliffe* in *Yorkshire*. All the evidence in the cause as far as it went, tended to prove a *modus*.

Evidence of a *modus* will not support the allegation of a real composition. S. C. 4 Wood's Decr. 10.

The court were of opinion, that though in case of a real com-

(a) [In *Baron Eyre's* notes the following memorandum is subjoined to this case.]

N. B. The next morning Mr. *Kenyon* told me, that the draughtsmen were apprehensive of being involved in difficulties by our order, directing the bill to be amended by adding parties. But I think not. They will make the usual parties in the first instance: if it appears afterwards by the answer, that other parties are necessary or convenient to be added, that will be a sufficient guide.

Mr. *Kenyon* objected, that the witnesses must be all examined over again: but that can never

be necessary if they move to amend in time, on the coming in of the answer: and if not, the court will always weigh the comparative conveniencies and inconveniencies.

Qu. On farther consideration, if the parties were not strictly necessary: for the defendant set up a title derived from one of the parties.

In another case on the motion of *Maddox*, it was said, that it would be an objection for want of parties, not to make the person in whom the title was a party.

(b) See *Gumley v. Fontleroy.* Bun. 60. Gwill. 628.

1777.

Robinson
v.
Appleton.

position it is not necessary to produce the deed of composition, yet there must be evidence tending to shew that such a deed had been executed; whereas the evidence in this cause went to shew a prescriptive payment or *modus*, which ought not to be confounded with a real composition. Decree for an account of tithes in kind.

Smith v. Goddard at *Serjeant's Inn Hall* (b), sittings after *Michaelmas* term 1777, same point determined.

M. 18 Geo. III. A. D. 1777. Scac.

John Basworth v. Joseph Limbrick the younger, Joseph Cullimore, and John Stock.

S. C.
4 Wood's
Decr. 24.
Rayn. 809.
934.
The marginal abstracts are attached to their respective subjects.

[1102]

THE plaintiff, as rector of the parish of *Tortworth*, in the county of *Gloucester*, filed his bill against the defendants, stating, That the defendant *Limbrick* had ever since 5th *April* 1773 occupied lands in the said parish, and kept thereon a considerable number of milch cows, which yielded great quantities of milk: that the defendant *Cullimore* had ever since 1st *January* 1773 occupied lands in the said parish, and kept several milch cows thereon, which also yielded great quantities of milk; that the defendant *Cullimore* mowed a close called *The Lager* in *Tortworth* in 1772, and dug potatoes in the said parish; and that both the last defendants had several other tithable matters during the time aforesaid in the said parish, the tithes of which were due to the plaintiff, but never set out for him: that the defendant *Cullimore*, his wife, and three or more children, of the age of sixteen years and upwards, living with him, had resided ever since 5th of *May* 1772 in the said parish, and that there was due from them to the plaintiff *Easter* offerings, at the rate of two-pence an head, for two years past.

The plaintiff charged by his bill, that he was entitled to, and ought to receive, the whole milk, milked on every tenth natural day, as well in the morning as in the evening, as and for the tithe of the milk of the cows, for the whole nine preceding natural days, which the plaintiff submitted to be the fair and equitable way of setting out tithe-milk in kind; and he insisted, that if the tithes of the milk of the whole herd of cows was to be set out at every tenth milking only, the owner of such cows would claim (contrary to natural justice) an option to set out the tithe, either at a morning's milking, or at an evening's milking, as he pleased, and would then set out the evening's milking for tithe, whereby the plaintiff would be much injured in not receiving his full tithe of milk; for that by the usual way of milking cows, the quantity and

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Bosworth
v.
Limbrick.

value of the milk of every cow milked in the afternoon or evening, was on an average one third less in quantity, and, consequently, in value, than the milk milked from the same cows in the morning of the same day, which was occasioned partly by the great inequality of the times between milking, and partly by the cattle not feeding so much in the day as they do in the night, by reason of the heat of weather, flies, and other causes; and he conceived, as the law gave him (as rector) the full tenth, and not any thing less than the tenth of the milk milked, an evening's meal, as and for the tithes, would be unfair, being so much less in quantity and value than the full tenth of the milk of such cows produced by the ten several milkings; and that therefore the only way for a parson entitled to the tithe of milk, to receive a full tenth thereof, was, that the milk milked on the tenth natural day, in the morning and evening, should be set out for the tithe of such milk. (a)

He charged, that the parish of *Tortworth* was a dairy parish, appropriated wholly to the keeping of milch cows and making butter and cheese, there not being in the whole parish above three acres of arable land (except the glebe) insomuch that the tithe of milk is the best and most valuable species of tithe belonging to the said rectory; and as the whole tenth part of the milk, and not any thing less than the tenth, (with the tithes of the other tithable matters arising in the said parish, which are, comparatively, but small) was given to the rector for the maintenance of himself and family, he submitted it to the court, that the setting out for tithe the milk milked on the evening of every fifth day only, would be prejudicial not only to the plaintiff, in diminishing the revenue of his rectory, but also to the patron thereof, by lessening the value of the advowson.

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And he further charged, that whenever the said defendants had set out the tithe of any milk in kind, they had always set it out in an evening, and never in a morning, or on the tenth natural day, as they ought to have done. He also charged, that the computation of time, when the milk of every person's cows that have calved should first begin to be tithable in every succeeding year, was, or ought to be, from the time when the first cow, after calving, in any new year, was brought to the pail and milked, the same being a new increase or renovation of the milk; and so, of every cow calving after such before-mentioned cow, the tithe ought to be set out on the same natural day and time, as that of the first cow in each succeeding year was, or ought to be, when first brought to the pail and milked after calving; and that the defendants, though their

(a) In S. C. Rayn. 828. is a table containing the differences between a morning and evening's milk adapted to various hours of milking.

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v.
Limbrick.

[1104]

This allegation was
fully
proved.

herds of cows were in the fall of each year dry, and yielded little or no milk, yet in order to effectuate the design of making all the milch cows of the whole parish perpetually tithable on one and the same natural day in every year, pretended throughout the year, on every tenth milking, to squeeze or press a very small quantity of milk out of the whole herd, and to set out the same as and for the tithe-milk of such cows; but the plaintiff insisted, that, in every succeeding year, the tithing-day of milk ought to be computed from the time when the first cow after calving comes to the pail to be milked in each year, and that the tithing-days of the whole herd of cows ought to be governed and calculated from the first day when such first cow, after calving, in every year, comes to the pail to be milked, and not by the unfair practice of milking a few cows which are in effect dry, as being then big with calf, and never milked, unless for such unfair purposes, in order to keep up a succession of tithing-days throughout the year, and to make the tithing-day from year to year to fall on one and the same natural day throughout the parish, intending thereby to injure and distress the parson, by constraining him to collect the tithes of the milk of the whole parish at one and the same milking: that although the defendants pretended, that they had fully and duly set out the tenth meal of their whole herd of cows, as and for the tithe of milk, yet the plaintiff charged the contrary to be true, and that he was entitled to the tenth natural day's milk of all the said cows, and not to the tenth evening's milk only; and that the evening's meals, which they pretended to set out, had been considerably less than they ought to have been, occasioned by the unequal space of time of milking in the morning and evening of those days, when the tithe had been pretended to be set out; for that such space of time between the morning and evening's milking was always longer on the days which were no tithe-days, than on those days which were called tithe-days, whereby a considerably less quantity than the full-tenth of such milk had been set out as the tithe thereof, which plaintiff conceived he was not bound to accept. And he particularly charged, that the defendant *Limbrick*, on 10th *May* next before the filing of the plaintiff's bill (being what he called a tithing-day), began to milk his cows so late as seven in the morning, and in the afternoon of that day he began to milk, as and for the tithe-meal, at three o'clock; and on 15th of same month, being what he called another tithing-day, he did not finish his morning's milking until between eight and nine of the morning of that day, and he began his evening's milking, which he pretended to set out for tithe, soon after three in the afternoon; and in like manner, and nearly about the same time, and for the same cause, his cows were milked on the 20th, 25th, and 30th *May* then ensuing, both in the morn-

ing and evening. And that in or near the like manner and ways the defendant *Cullimore* had carried on his milking, and the tithing of his milch cows from 19th *July* 1772, being what he called a tithing-day, on which day he began to milk his cows, for what he called the evening's milking, before two o'clock in the afternoon of that day; and in like manner, and for the like cause, his cows were milked on 17th *September* last, being what he called a tithing-day, on which day he began to milk his cows for what he called the evening's milking, before three o'clock in the afternoon of that day; and in like manner, and for the like cause, he milked his cows early in the afternoon of the other days in the bill mentioned, being what he called tithing-days. And the plaintiff mentioned several other instances, wherein both the defendants, on the days they called [1105] tithing-days, milked their cows very late in the morning, and early in the afternoon, and not at the hours when they milked their cows on other days, which were not tithing-days, by which mode of milking on tithing-days the plaintiff was greatly injured.

The bill also charged, that the defendants had frequently put the milk milked for tithe into unclean or unwholesome vessels; and sometimes had put runnet or other ingredients therein, to injure and spoil it; at other times had permitted pigs and dogs to drink up the same before the whole milking was over, and often permitted such pigs to get into the vessels wherein such milk was placed, and to wallow therein; and also had encouraged and permitted several poor persons to take and carry away the said tithe-milk, before the cows were all fully milked, whereby the plaintiff was injured; and the bill charged several instances, wherein such practices had been committed.

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v.
Limbrick.
These allegations were fully proved.

It further charged, that in the parish of *Tortworth* there is no ancient custom respecting the mode of setting out the tithe of milk, and that the plaintiff in the year 1772 took the tithe-milk in the manner the defendants thought proper to set out the same, in order to prevent the same from being spoiled; but finding the same to be much less in quantity than the fair full tenth part of the milk, refused to accept the same any longer than during the said year 1772, of which he gave notice to the defendants.

The bill also charged, that since 1st *January* 1773, the milk milked by the defendants, and pretended to be set out for tithe, had been frequently thrown down or spoiled by, or by the orders and with the privity or consent of, the defendants, without giving the plaintiff any previous notice of setting out the tithe, which notice plaintiff charged they ought to have given.

The bill then stated, that the plaintiff claimed the benefit of a road over three closes of ground, in the possession of the defendant *Stock* (other part of lord *Ducie's* estate) in *Tortworth*, as appurtenant

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Limbrick.

[1106]

or belonging to defendant *Limbrick's* said lands, and used by the occupiers thereof, for the plaintiff to fetch and carry his tithes arising thereon to the rectory house in *Tortworth*; and that the usual gate in one of *Stock's* closes was lately taken down, and the gap made up, to prevent the plaintiff from fetching his tithes that way, whereby, if he gathered his tithes arising on *Limbrick's* lands, he was necessitated to do it in a very circuitous manner, by a road one mile and an half further about than the way claimed (which is only one mile and six poles) and nearly the whole thereof out of the parish of *Tortworth*, which he conceived to be unreasonable.

And the plaintiff also charged, that as the tithe of milk in *Tortworth* was valuable, he was desirous that the mode of tithing the same should be settled by the court of Exchequer, and submitted to accept the tithe thereof in the manner the other occupiers of land in the said parish thought fit to set it out, in order that the same might not be wasted or spoiled pending the suit, holding the same would not be deemed any prejudice to the right which by his bill he ought to establish; wherefore as the defendants refuse to account with the plaintiff for the value of the tithes before mentioned, the plaintiff prayed that they might be decreed to account with him for the single value of the tithes, and that the defendant *Stock* might be decreed to open the gap so made up by him, that the plaintiff might be enabled to bring home his tithes through and along the fields in the bill mentioned.

The defendants *Limbrick* and *Cullimore* said, that they occupied in the parish, and also in several adjoining parishes, lands of a great yearly value; and that they had kept thereon milch cows, which had yielded considerable quantities of milk therein.

The defendant *Cullimore* said, that in *July* 1771 he received notice in writing from the plaintiff, that from and after the 5th day of *April* then next, the composition between them for tithes should cease on the then terms; and that the tithes should be taken in kind, unless he would make such recompence for them as the plaintiff should approve; that the plaintiff was very exorbitant in his demands; that he therefore gave him notice in writing, that he should set out the tithe of milk at his usual milking places, in the afternoon of the 10th of *April* then instant, at his usual time of milking in the afternoon; that the same would, in like manner, be continued to be set out as it should become due; that he accordingly in the evening of that day set out the tithe of his milk then milked, being the tenth meal, computing the same from the night of the 5th of *April* 1772, making the morning's meal of the 6th of *April*, the first meal from the time the former composition was, by the plaintiff's notice, to cease; that the same was the regular and usual mode of setting out the tithe of milk, it being by every tenth

meal, and not of all the milk milked on the tenth natural day; and that having so set * out his tithe-milk in the afternoon of the said 10th of *April*, the plaintiff sent for and took away the same.

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*[1107]

The defendant *Limbrick* said, that he entered on his said lands in *Tortworth* on the four several days in the answer mentioned; that his cows were brought on his lands in the evening of the said 5th of *May* 1773; that he then gave the plaintiff notice in writing that he had that evening brought on his lands in *Tortworth* ten cows; and that he should set out the tithe-milk, which would be due to the plaintiff on *Monday* the 10th of *May* in *Floodgate Mead*; that he should afterwards continue to set out the tithe-milk as it should become due at the usual milking place; that in the afternoon of that day he set out the milk of his cows then milked, as and for the tithe, the same being the tenth meal of milk next after his cows had been brought into the parish.

The defendants admitted, that *Tortworth* was a dairy parish; and said, that they had both in the years 1772 and 1773 constantly set out the tenth meal of milk, such meal being an evening meal only; and they insisted, that the tithe of milk ought not to be taken in the morning as well as evening of the tenth natural day, because then the calves must on that day go without milk to feed them; that there would be no whey to give the pigs, which in dairy farms is almost the only thing to give them, that a calf at ten days old would drink more milk than one cow would give; and that they were generally kept seven weeks, if not more, for the butcher. They further said, that the rector was entitled to the tithe of milk as long as the cows gave any; that it was usual in all dairy farms to milk their cows as long as they gave any milk, all the year round; that, as the rector was entitled to every tenth meal, they had duly set out the same; and that such milking their cows all the year round could not be to prejudice the plaintiff, because it was always usual so to do, and thereby the cows were the better; that such milking was necessary also on account of the cows calving at different times of the year, those which calve in the summer giving milk all the winter; and in large dairy farms the cows calve in almost every month in the year, so that if cows were not to be milked in the winter they must necessarily suffer great loss. They further said, that at the usual time after the calving, when each cow came to the pail, they had regularly on the next tithing-milk-day set out the milk of such cows, with that of the others which had been before in milking, which was giving the rector a considerable advantage. They insisted, that the legal mode of tithing milk was by setting out every tenth meal of the whole herd, and not by setting out the tenth meal of each cow, computed from the [1108]

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Limbrick. time of its first coming to the pail. They denied, that they had pretended that the plaintiff was entitled to the tenth evening's meal only, and no other for his tithe, but said that he was entitled to the tenth meal, whether it happened to be in the morning or evening; and that they had severally set out on every fifth day the tenth meal of their whole respective herds. They also denied, that, in order to prejudice the plaintiff, they had used any unfair practices to lessen the quantity or value of his tithes, or that on tithing-days they had milked later in the morning, and sooner in the evening, than was usual on other days; for on the contrary their orders to their servants always were, to use no unfair dealings whatever to prejudice the plaintiff; they then stated the particular hours in the morning and evening, in the several various seasons of the year, when they began their several and respective milkings as fully mentioned in their answers.

The defendant *Cullimore* set forth the other tithable matters and things he had on his said farms and lands, and spoke fully as to the farm occupied by the defendant *Stock*, and respecting the way through the said farm, which the plaintiff said he had a right to take his tithes through, and denied the plaintiff had a right to go over the closes in the bill mentioned.

The defendant *Stock* denied the right of the plaintiff, or of any other person to go over the closes occupied by him. He admitted, that he did cause the gate to be taken down and the gap hedged up, and insisted that he was justified in so doing, and in preventing the plaintiff from going over any of the said closes, he having no right so to do.

The plaintiff replied; the defendant rejoined; and witnesses were examined on both sides; and on the cause coming on to a hearing, and the arguments of counsel having been gone through, Mr. Baron *Eyre* delivered the opinion of the court, the chief Baron *Smythe* being absent from indisposition.

Eyre B. — Dr. *John Bosworth* rector of *Tortworth* in the county of *Gloucester* files his bill against three defendants, *Joseph Limbrick*, *Joseph Cullimore*, and *John Stock*, praying against *Limbrick* an account of the tithe of milk from the 5th of *April* 1773; against *Cullimore* an account of the tithe of milk from the 1st *Jan.* 1773: also an account of the tithe of hay of parcel of the meadow called the *Lagger*, mowed in the year 1772; of potatoes dug in the year 1772 [1109] and 1773; of *Easter* offerings; and, under the general words "tithable matters," the plaintiff's counsel also pray against *Cullimore* an account of agistment-tithes. As against the defendant *Stock*, the plaintiff prays to have a road opened over lands in his occupation by which the plaintiff may carry off his tithes arising

upon lands in the occupation of the defendant *Limbrick*. The case of the last of these defendants is unconnected with that of the other two, and it arises from the following facts: —

The lands now in the several occupations of *Stock* and *Limbrick* were before occupied together as one farm; and there was then a communication from *Limbrick's* part over that of *Stock's*, with a public highway in the parish of *Tortworth*, which communication is now obstructed by the defendant *Stock*. This would be the nearest and most convenient road for Dr. *Bosworth* to carry off his tithes; and he has brought some evidence to prove, that this line of road is in fact a public highway. It appears, that there is another communication by the high road from *Tortworth* through part of the parish of *Charfield* over lands in the occupation of *Sarah Cullimore*, who has refused to permit Dr. *Bosworth* to pass that way. It further appears, that *Limbrick's* lands communicated with his farm-yard, whence there is a communication with the high road in the parish of *Charfield*, leading to the parish of *Tortworth*, and that this would be the farthest and most inconvenient road for Dr. *Bosworth*.

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The tithe-owner is not entitled to the use of a private road, which was made while the lands were in the occupation of one person, after they are split into several occupations.

We are of opinion that this is not a case in which a court of Equity can interfere. If the road is a public one, the plaintiff's remedy is at law, either by indictment, or, in respect of special damage, by action on the case. The parson must undoubtedly have a right of way to carry off his tithes from the place on which they arise; and the occupier must open a passage for him, or he subtracts his tithes. Ordinarily, the parson is understood to have a right to use the same road which the occupier uses. If the occupier has a right, the parson has also. It is accident whether this way is more or less convenient, nearer or farther. Its being the nearest cannot alone give the parson a right to pass over another man's land. There having been a communication when all the lands were in one occupation, which the parson might then have been entitled to use, because the occupier used it, is no argument in support of a claim to use it, when the occupation becomes several. The several occupiers may have no right to use it, therefore the parson can derive no such right from them. As against the defendant *Stock*, therefore, this bill must be dismissed with costs (a).

The question in regard to the hay claimed of *Cullimore*, depended [1110] merely on a matter of fact; whether, in truth, the tithes had been subtracted or not. The court were of opinion on the evidence, that the tithes had been subtracted.

The case made by the plaintiff respecting potatoes, is that of a

Potatoes
must be

(a) See *Cobb v. Selby*. 1 New. Rep. 486. *infra*.

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tithed on
the spot
where they
are dug.

few bushels of potatoes raised in a field called *How Croft*, which, in 1773, were dug up and brought home to the defendant's house without setting out the tenth part. The defendant insists, that after they were brought home and placed in the brewhouse, they were there measured and duly set out for the plaintiff.

This is certainly not a due setting out of this species of tithe. The parson has a right to insist, that a tenth part should be separated from the ninth part, upon the spot where the potatoes are dug, and before they are removed. As to this article, therefore, an account must be directed.

Agistment-
tithe is due
for beasts of
the plough,
if they are
used in
another
parish.

Supra 1029.

In regard to the agistment-tithe, there was a point made at the hearing, whether beasts of the plough depastured in the plaintiff's parish, and used by the defendant in another parish, should pay an agistment-tithe.

If it were proper to consider this question now, I need only refer to the case of *Scoles v. Lowther*, 1 *Ld. Raym.* 129, 130. which is in point that they shall pay. And the reason is obvious. Being depastured in the same parish where they work, the *uberiores decima*, which are the effect of their labour, are a satisfaction for the tithe of their pasture. If they work in another parish, there can be no such satisfaction, and the parson must have an agistment-tithe or none. But the question will remain open to be discussed, if the parties think fit, when the charge for agistment is brought before the Deputy Remembrancer.

The parson
is entitled
to the tenth
morning's
meal of
milk, and
the tenth
evening's
meal of
milk, for
his tithe of
milk.

We come now to the great question in the cause, the plaintiff's claim to an account of the tithe of milk, as against the two defendants *Limbrick* and *Cullimore*.

These defendants profess to have duly set out to the plaintiff for his tithe every fifth evening's meal, which they say is the tenth meal, which the parson is entitled to. They having brought their cows to the pail in this parish in the morning, and beginning to count from the morning of that day to the evening, and so on, the fifth evening's meal of milk makes the tenth meal, which is the parson's due. The plaintiff contends that the setting out of every fifth evening's milk is not a due mode of tithing.

[1111] The argument for the plaintiff assumes this fact, that the produce of the evening's milk must always be less in quantity than the morning's meal; and the witnesses on both sides agree that the fact is so. *Clark*, the plaintiff's witness, made a great number of experiments in order to ascertain the proportion in which the evening's meal fell short; and it appeared, upon the result of these experiments, that it frequently fell short a third, but never less than a fourth of the morning's. It follows that a fifth evening's meal constantly set out must produce less than a tenth part of the milk. This being the fact, the argument then proceeds thus. — The tithe of milk, as of

all other tithable matters, belonging *de jure* to the parson, is the tenth part of the milk produced. A rule of tithing, therefore, which necessarily gives to the parson less than the tenth cannot be the true rule. It was admitted, that it had been thus far settled by the few cases which are to be found upon the subject of the tithe of milk, that neither the tenth part of every cow's milk at every meal, nor the tenth part of each meal, was to be set out for the parson, and that the tenth meal was to be set out. But the plaintiff insists, that the tenth meal must not be so computed, as necessarily to produce less than a tenth part of the whole ten meals measured together. The plaintiff's counsel endeavoured to point out a manner of taking the tenth meal which would not be liable to this objection, viz. taking a morning's and evening's meal alternately, or the whole milk of the tenth day. The defendant's counsel say, that in the one case it would be taking the 19th and 20th meals, instead of every tenth; in the other case, it would be sometimes the ninth, and sometimes the eleventh: in either case therefore they contend, that this would be departing from the rule of law settled by several determinations.

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Upon general principles, it seems improbable that that should be the true rule of tithing, which puts it in the power of the farmer to give the parson a twelfth or fourteenth instead of a tenth. A prescription to pay less than a tenth without a compensation would certainly be a bad prescription. When a tenth meal was declared to be the right of the parson, it was substituted in the room of the tenth quart, or the tenth part of each meal. It was not meant to give less than a tenth, but the tenth in a more convenient form. It was auxiliary to the general right, and intended to fortify, and not to destroy it. If it turns out to be capable of being made to operate to the destruction of that right, (as it will certainly do in the sense in which the defendants understand it,) it should seem, that the right would be to be supported, and the rule condemned as not warranted by the law of *England*, and fundamentally erroneous in the original conception of it; and to correct this rule would be restoring, not altering the law. But we ought not hastily to condemn a rule laid down upon great debate and consideration of different modes of tithing. We ought rather to suspect we have not understood the true sense and meaning of the rule. Unquestionably, if a construction can be put upon this rule, which will preserve the original spirit, truth, and justice of it, and put it out of the power of any man to make it an instrument of fraud; the court will incline strongly to adopt it. We think such a construction may be put.

[1112]

The morning and evening meals being necessarily unequal in produce, may and ought to be considered as distinct tithable matters; from each of which you may count on to the tenth; and that

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tenth will be the tenth meal of the description to which it belongs, and, as such, the tithe meal either morning or evening; and thus the parson will have a fair chance for a full tenth of the whole milk, instead of necessarily taking less in the defendant's way of setting out the tithe.

As to authorities, upon a careful review of all the cases, we not only do not find any adjudged case standing in our way, but we collect, that the rule of the tenth meal was originally understood in the sense in which we think that it ought to be construed.

1 Wood's
Decr. 176.

There is an older case than any cited at the bar, that of *Silverlocke v. Isles*, heard in this court 6th May, East. 30 Car. 2. The bill was (*inter al.*) for tithe-milk in the parish of *West Tilbury* in the county of *Essex*. The defendants insisted, that the custom of the parishioners was to pay the tenth day's, or tenth meal's milk, from the 1st day of *May* to the 1st of *August* yearly, in full satisfaction of all tithe-milk throughout the year. The court held the custom to be illegal. The language of this case is material to shew, that two successive meals were included in the idea of the tenth meal's milk.

Supra 527.
Sir T.
Raym. 277.
Freem. 329.

Dodd v. Ingleton is the next case in order of time. In that case, the plaintiff claimed under a custom in the parish to have his tithe-milk brought home, and that he was not to take less than the whole milk of all the cows every tenth day. The defendant denied this claim, and insisted, that the vicar was to fetch his milk, and that he was to have his tithe-milk at every meal. The court being unanimously of opinion, that the tenth meal's milk, and not the tenth of every meal's milk, was to be paid, it is taken for granted by the parties, and therefore ordered by consent of the defendant, that for the future, the defendant should pay his whole tenth meal's milk every morning, and his whole tenth meal's milk every evening. This was interlocutory, the other point upon the custom not being then determined. Afterwards, there is a final decree in the same words, not said *by consent*. From this case we may fairly collect, that both the court and parties at this time understood, that the tenth meal's milk included two successive meals.

2 Salk. 656.
S. C.
Carth. 461.

Lord *Raymond* in his first volume, 358, reports the case of *Hill v. Vaux* in prohibition; and that again is on a usage to set out two successive meals for the whole tithe-meal.

1 Wood
416.

The next is the case of *Ekins v. Bridges*, in this court the 26th of *April* 1703. The custom as there stated takes for granted, that it is the meal which is paid for tithes in kind, and it is the milk of the ninth night and tenth morning which is the tithe-meal.

These are the four first cases to be found relative to tithing by the meal. In the three first it appears to be the custom of the country, that the tenth-meal given for the tithe included two suc-

cessive meals. The fourth is an adjudication, that where it was declared the tenth meal's milk ought to be paid, two successive meals ought to be paid.

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Limbrick.
Supra 711.
2 Wood's
Decr. 314.

There was a fifth case to the same effect in 1731. *Brinklow and others v. Edmunds*, 8th November, reported in *Bunbury* 307.; but see the Decree-Book. The custom here was to pay the tenth evening and morning's meals milk commencing upon the evening of the next Monday (being the Monday fortnight after *Easter Day*) and the morning following to *All Saints Day* yearly. Two cases, *Bate v. Sprakling*, 18th February 1717, and *Dodson v. Oliver, East.* 21. had intervened between the two last cases: but as the others all pointed one way, we thought it best to shew them together. From the tenor of these cases as well as from the reason of the thing we collect, that the true construction of the rule of tithing by the tenth meal is, and was originally, that the tenth morning's meal, and the tenth evening's meal are to be paid, and not the tenth meal, reckoning morning's and evening's meal together. Thus the objection, that this would be taking the nineteenth and twentieth meals is answered.

The argument of inconvenience to the farmer from the being obliged by this method to part with two successive meals has weight; but it must not be suffered to outweigh the justice of the case. The customs of taking two successive meals appear by the four cases above cited to have been insisted on by the farmers themselves; and they come out of the heart of some of the dairy counties, *Essex, Berks, Northamptonshire*. There hardly exist any modes of taking tithes in kind wholly free from inconvenience. The inconveniences are probably mutual. In future they will suggest mutual accommodation; and a reasonable composition will be settled between the parson and the farmer. [1114]

Four cases were cited by the defendants as having established that the tenth meal was to be taken for the tithe of milk. The first was *Dodd v. Ingleton* from Sir *Thomas Raymond*. But this, corrected and explained by the Decree-Book, is in truth an authority for the plaintiff; for the court having adjudged that the tenth meal is to be paid, as a consequence order the tenth meal of the morning and the tenth meal of the evening to be paid. Supra 527.

Bate v. Sprakling, from *Bunbury*, is a loose note of a case decreed in Hil. 1717, which says that it was decreed that tithe-milk ought to be paid every tenth meal. From the Decree-Book it appears that the defendant had set out the tenth part of each meal. This was clearly wrong, and the defendant was therefore decreed to account. The court was not called upon to say, nor did they in fact say, how the tenth meal was to be computed. Supra 618.

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v.
Limbrick.
• *Supra.*
623.

The third case was **Dodson v. Oliver, Bunb. 73.* This too was a very loose note, and the substance of it, as far as regards the manner of taking the tenth meal, seems to be a note of the Reporter's own understanding of what was the general rule as to the manner of taking tithe-milk, not of what had been decided in that case. In the Decree-Book (a) the bill appears to have been (*inter alia*) for tithe of milk. But there was no point made in the cause upon the manner of tithing milk, nor is there any declaration by the court upon it. If any thing of this sort fell from the court, it was general and certainly not pointed to the distinction between the tenth meal, reckoning morning and evening meals together and separately, which is our point.

Supra 826.

The last case is, *Carthew v. Edwards*, in this court 1st May 1749, and 5th June 1749. Here, there was a declaration by the court in these words, which I have taken from the Minute Book, the decree itself having never been drawn up for a reason which will appear presently. "The court declare, that the defendant "ought to have milkt the tenth meal of his cows in vessels of "his own, at the place and in the manner he milkt the said nine "meals, and that the plaintiff ought to have fetched it away in his "own vessels." And it appearing to the court, "that the de- "fendant poured the tithe-milk into holes or pits made in the
[1115] "ground, the court decree, that the defendant is to account for the "same to the plaintiff." The defendant then agreed to pay 30*l.* in lieu of what should be due on the account, &c. which was therefore decreed. I suppose the money was paid, and so the decree was never drawn up. I called for the pleadings in this case, and from them it appears that the single point in dispute was, who was to carry the tithe-milk home. In that the defendant succeeded, but not having set out his tithes well, because he poured the milk into holes immediately, therefore he was decreed to account. The question now before the court was not in contemplation in this, nor in any of the other cases, nor was meant to be decided in any of them. Consequently, they are not to be understood as cases adjudged on the point, which was the proposition I meant to establish.

There appears to us therefore to be nothing in point of argument or authority, which should prevent us from effecting the justice of the case between these parties, by declaring, that the defendants ought to have paid to the plaintiff the tenth morning's meal and the tenth evening's meal, in which having failed, they are now to account.

(a) 2 Wood's Decr. 149.

To prevent mistakes I would add, that it is by accident it happens in this particular case to be the whole milk of the day. If the cows had been begun to be milked in the evening instead of the morning, the tithe-milk would have been due in the evening and in the morning of the succeeding day, which would have been the Jewish day which we have heard of."

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Limbrick.

The court therefore declared the plaintiff entitled to the tenth morning's meal of milk and the tenth evening's meal of milk, and ordered the defendants *Cullimore* and *Limbrick* to account for the same with costs.

From this part of the decree, which related to the tithe of milk, there was an appeal to the House of Lords, which was heard on the 2d and 3d of February 1779, when the decree was affirmed without any debate or division. The case was argued by the Attorney General and *Mansfield* for the appellants, and by *Dunning* and *Harding* for the respondents; and before the Lord Chancellor *Thurlow*, and the Lords *Mansfield*, *Bathurst*, *Camden*, &c.

The reasons in objection to, and support of, the decree, as urged in the printed cases, were as follows:

The Appellants' Reasons.

[1116]

1. The mode of setting out tithe of milk by the tenth meal insisted on by the appellants, has been long established and universally received. It seems to have been first introduced from an inclination to favour the clergy, who, in ancient times, were supposed to be entitled to only a tenth part of every meal of milk, which at every milking they were obliged to send for and take away, and to whom therefore it was much more convenient to have the whole of every tenth meal allotted to them, which they might receive altogether at one milking, without the trouble of sending more than once for their tithes. The mode of tithing contended for by the respondent, and established by the decree, that is, by giving to the respondent the whole meal of every tenth morning and every tenth evening, is perfectly new. Instead of giving to the parson the tenth meal, it gives him the nineteenth and twentieth meals, which is not only not warranted by the cases in which the parson has been determined to be entitled to every tenth meal, but is directly contrary to them. And it seems, that the parson might with as great appearance of reason have pretended a right to the milk of the first and the twentieth meals, every meal or milking being in itself, as well as in the language of the cases relative to this subject, perfectly distinct, there being no more connection between the nineteenth and twentieth meals, than between the first and the twentieth.

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2. The mode of tithing thus established by the decree is not only not warranted by any decision relating to the tithe of milk, but is also contrary to the mode of tithing, which prevails with regard to all other species of tithes, and to the general rules by which this kind of property is regulated; the owner of tithes being universally entitled to the tenth part of the subject to be tithed, and nothing more, and the decree here giving to the respondent not the tenth part of the milk, but the nineteenth and twentieth parts.

3. This mode of tithing by the tenth morning and tenth evening's meals will subject the farmers who have large dairies to most unreasonable hardships, where the tithe of milk is thus taken in kind. Besides other inconveniencies to the farmers above pointed out, their calves, which can only be supported by new milk, must every tenth day be destitute of food and subsistence. By such a mode of tithing, therefore, a parson will acquire a power of exacting [1117] an exorbitant recompence for his tithe of milk, or where a farmer has incurred his resentment, of injuring and oppressing him, by taking such tithe in kind.

The Respondent's Reasons.

1. That a rector is entitled, *de jure*, to a full tenth of all milk of cows within his rectory, as well as a tenth of all other tithable matters there arising; and so the court of Exchequer declared.

2. That a mode of setting out a fifteenth, or any thing less than the full tenth, for tithe, as the appellants had done, cannot be the true rule of tithing, if the rector be entitled to a full tenth.

3. That a prescription to pay less than a tenth is a void prescription.

4. That when the tenth meal was originally declared to be the right of the parson, it was substituted in the room of the tenth quart, or the tenth dish, or the tenth part of each meal; it was never meant to give him less than a full tenth of the tithable object; it was meant to give the tenth in a more convenient and useful manner; it was therefore auxiliary to the general right of a free tenth, to secure and not to destroy that right.

5. That the setting out the tenth part of every meal, as also the setting out the tenth of each cow's milk at each milking, have been condemned as founded in inconvenience to the parson from the great unnecessary trouble and expence it would create by those numerous and frequent tithings. Upon the same principle, the attempt of the appellants to make one and the same day to be successively and perpetually the tithing-day of milk for all the farmers in this parish (where near 400 cows are milked daily) is illegal; as it would be productive of vast expence and distress, in procuring

a proper number of persons, horses, and utensils, to be employed by the parson, or lay impropriator, in collecting and making it into cheese or butter; and the expence and trouble of collecting and manufacturing it, would greatly exceed the value of the tithe-milk, if it could be so collected, and in the end would make the tithe-milk (which if set out fair is a valuable tithe) to be of no worth to a parson or lay impropriator, but would subject him to vexatious suits, for not fetching it away in convenient time after it was set out, though perhaps, it was not in any man's power to do it.

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6. That the tenth meal, and the tenth day has been and ought to be considered as expressive of one and the same idea, and the tenth of the morning's milking and the tenth of the evening's milking, have conjunctly been considered as the tenth meal; and so it was determined in the cause of *Dod*, vicar of *Chigwell* in *Essex*, against *Ingleton*, where the court decreed, that the defendant ought to pay the whole tenth meal's milk of all his cows every tenth morning, and the whole tenth meal's milk every tenth evening, as and for tithe of milk. Supra 527. [1118]

7. There have been also divers other cases of customary tithings, where, in the general understanding of the country, the tenth meal included two successive milkings, namely, the tenth morning's and the tenth evening's milking; and this sense of the tenth meal was insisted on by the farmers themselves, and all those causes arose out of the herds of dairy counties, viz. *Essex*, *Northampton*, and *Buckingham*.

8. That the produce of an evening's milking (as proved in the cause) is on an average throughout the year at least one-third less than that of a morning, owing to the space of time between the morning's milking and the evening's milking being much shorter than that between the evening and the morning's milking, and to other causes, such as heat of weather, flies, and the like; an evening's milking therefore fails of being a full tenth of the milk milked from the cows at ten successive mornings and evenings milkings, and is no more than setting out a part for the whole, which is void.

9. That the setting out the tenth milking on every fifth day in the morning alone for the tithe, would be as much too great, as an evening's meal would be too little, and would be full as prejudicial to the farmer as the other would be to the parson, and therefore neither of them alone ought to be adopted; but the setting out the tenth morning's milking as the tithe of the mornings, and the tenth evening's milking as the tithe of the evening's milk, avoids both objections, whether the computation begins in an evening or a morning, and at once establishes an equal general mode of tithing

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*Limbrick.*Objections
answered.

between farmer and parson, founded in justice and equality, the highest equity.

Objection. — But to this, inconvenience is objected on the side of the appellants.

Answer. — No inconvenience ought to outweigh the justice of the cause; the farmer ought not to be permitted to take a manifest unjust advantage to himself by yielding one-third less than what is due on that account.

[1119] *Objection.* — That if two successive milkings, viz. in a morning and an evening, are established as the tithe-meal, then the farmer's calves on that day must go without new milk, and there will be no whey to give the pigs, which, in dairy farms, is what the farmer depends on.

Answer. — Calves are tithable when weanable, that is, when of an age to live without the dam, or natural food, as grass or hay; the appellants say, when the calves are three weeks old in summer, and one month in winter, they can so live; consequently, till those periods the whole milk of the cow is applied for the support of its own calf, and none set out for tithe; hence no inconvenience or want of milk for calves results from this mode of tithing, as the whole milk of each cow is applied for the support of its own calf until weaned and gone; at which time the cow may be said first to come to the pail, and to be tithable; that the milk of each cow is alone sufficient for raising its own calf; that as the calf advances in age, it has daily less occasion for milk, being gradually more and more able to support itself by grass and hay, until it accomplishes the full weanable age, to live solely on the same food as the dam does; that the calves destined for tithes are always left by the appellants in a state of nature, to subsist on the milk of their proper dams only.

The law of tithes, as well as of other things, should rest on principles that are fixed and certain; it is intended to be a rule of conduct equally obvious to the receiver of tithe as to the payer; but, if the introduction of new and artificial modes of rearing calves is to vary and alter the parson's right, originally settled on the immutable laws of nature, there will remain no settled law, no known rule of conduct for the parson, but the will and capricious practices of the farmer will constitute the law. And why not in every other species of tithe, if allowed in this?

That it appears abundantly in proof in the cause, that in dairy farms (such as the appellants are) calves fall between the months of *January* and *April* yearly, and at no other times in the year, except an accidental calf, and all calves are generally gone from the cows by the month of *April*; so that there are seven months yearly, including the whole of the summer, the most advantageous season

for making butter and cheese, when the cows are without any calves; consequently, their milk is not then wanted for the support of their calves. 1777.

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As to pigs, it is notorious, that they may be, and are supported from the preceding day's milk, as well as from whey, wash, corn, and other such like food; and that they never depend upon the produce of the day for subsistence, but are provided with a stock of food beforehand. (a) [1120]

P. 18 Geo. III. A. D. 1778. Scac.

Lowther v. Bolton. [MS.]

Sir *James Lowther* filed his bill, stating, that he was and for many years past had been seised in fee and proprietor and owner of all and every the tithes of corn and grain, and other great and predial tithes whatsoever arising, growing, and renewing within the manor and parish of *Askam* and the liberties and precincts thereof.

It is sufficient to sustain a bill for tithes by a layman to state generally that he is entitled to them.

The defendant demurred, for that the plaintiff had not shewn by his bill any title to the tithes.

In support of the demurrer it was urged, that the plaintiff stated no title whatsoever to the tithes, inasmuch as he did not state that he was seised of an impropriate rectory, or of a portion of tithes, or of the tithes of an extra-parochial place, or, in fine, what was the nature of his title.

The demurrer was over-ruled; and it was holden sufficient to sustain a bill for tithes, to state that the plaintiff was entitled to the tithes without more. (b)

P. 18 Geo. III. A. D. 1778. B.R.

Haywood v. Nicholls. [MS.]

THIS was a feigned issue founded upon an inclosure bill to try 1st. Whether a sum of 4*l.* paid in lieu of the tithes of a farm was paid as a *modus* in lieu of the tithes? 2d, Whether it was paid as a composition real?

Qu. If evidence of immemorial payment only be sufficient to prove a composition real? What is evidence of a *modus* being rank?

This cause was tried before Mr. Baron *Eyre* at *Oxford*, and on the trial it was proved, that the sum of 4*l.* had regularly and immemorially been paid in lieu of the tithes of this farm, which consisted of 114 acres, and is now of the value of 70*l.* a year. It was also proved that about sixty or seventy years ago, the farm was let for 54*l.* a year.

(a) See also *Hutchins v. Full*, *infra* 1200. *supra* 650. *Charlton v. Charlton.* Bun. 325.
(b) *Crayhorne v. Taylor*, 2 Bro. P. C. 514. *supra* 715.

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 [1121]

For the defendant it was insisted that the *modus* was rank; and to shew it to be so, a licence of alienation in the time of *Edw. 6.* was proved, in which the value was stated to be less than 5*l. per annum.* The defendant's counsel also relied upon the statute of *Eliz. 18. c. 6.* which directs that the third part of the annual value of lands leased by colleges (which the present farm was) shall be reserved in corn at the rate of 6*s. 8d. per quarter*, which is not above the sixth part of the value of corn now, and therefore it was said, the land could not be above the sixth part of the present value at that time.

A great part of the farm was proved by reputation to have been formerly woodland.

Baron *Eyre* told the jury, that where there was no other evidence given than that of payment of a certain annual sum, it must be considered as proof of a *modus*, and was not sufficient to prove a composition real.

The jury found a verdict on the first count of the declaration, which was for the *modus*.

Adair Serjeant moved for, and obtained a rule to shew cause why there should not be a new trial, on the ground that 4*l.* was in this case a rank *modus*.

Bearcroft for the plaintiff. — The rankness of a *modus* is a question of fact, and not of law. A composition real is a composition made by persons who had a right to make it; and till the 13th of *Eliz.* the parson, patron, and ordinary, might make such composition. In *Smith v. Chapman*, 2 *Vez.* 506. there was a *modus* of ninepence *per acre* for marsh land; and though it was proved that in the time of *H. 8.* the land was worth only 2*s.* an acre, and that was sent to a jury. This farm consists of 114 acres, and it is uncertain what was the value formerly. The arguments for the defendant are extremely weak; for the value of the land in the time of *Edw. 6.* is not proved by the value given in for the licence of alienation. When a value is given in for the purpose of being taxed, it is never above half the real value.

The judge at the trial said, it could not be a composition real, but must be a *modus* or nothing: for else every rank *modus* would be supported as a composition real.

Milles S. S. — The judge held, that constant payment of a certain sum alone would not be sufficient to establish a real composition. But there is no foundation for that in the books; and the deed may be presumed to be lost. As to the licence in the time of *E. 6.* besides the favour always shewn in such cases, there appeared to be a lease before that time (a) for a sum paid, and a rent of 4*l. per an-*

(a) This was not so stated in the report.

*num. * 3 Atk. 534.* In *Williamson v. Caley* (a) lately in the Exchequer, and tried at York spring assizes before Gould J. 10*l.* a year was holden to be a good *modus* for a farm, though the present value was proved to be 100*l.* or 140*l.* a year.

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* *Supra*

800.

There is no evidence in this case that any other payment was ever made.

Adair Serjeant contra. — I consider the question as open, whether the verdict can be supported on either count. In *Smith v. Goddard* in the Exchequer at the sittings after last Michaelmas term, a *modus* was proved to have been paid regularly for 150 years. The defendant afterwards varied his case, and instead of stating it to be a *modus*, stated it as a composition real; but the court would not grant an issue on that ground, but only whether it were a *modus* or not (b); because the mere fact of payment was no evidence of a real composition. — If it were to be holden otherwise, there would be an end of the doctrine of a *modus* being rank. The question then is, Whether the verdict for the *modus* is warranted by the evidence given? If the licence do not prove the real value, yet it shews that the estate was something near that value. In the reign of queen Elizabeth the value of corn was not a sixth part of what it is now, and therefore land could not be above a sixth part of the value that it is now.

4 Wood's
Decr. 586.

Lord Mansfield. — To support an uninterrupted usage you presume any thing. I take the distinction between a *modus* and a real composition to be settled. There is a great difference between a *modus* which is rank upon the face of it, and which is to be made so by evidence; as, if there were a *modus* of one shilling for a sheep, that would be rank upon the face of it.

Buller J. held, that the evidence on the part of the defendant was so extremely slight, that there ought not to be a new trial. For the licence was no proof of the real value; which seemed to be admitted by the counsel, because they contended only, that it was something near the value; but how near, or what proportion it bore to the real value was quite uncertain. And as to the price of corn, it ought to have no weight at all; because this was not an arable farm only, and formerly great part of it was supposed to be woodland. Besides, there was a presumptive proof that this estate was of much more considerable value formerly, than was supposed by the defendant; for though most lands within the kingdom have [1123] been raised one-third in value within twenty years past, yet this

(a) 4 Wood's Decr. 3. reported as to a point, on further directions, *infra* 1123.

(b) 4 Wood's Decr. 586. The Lord C. Baron told *Buller J.* that this case was determined on the particular circumstances of it, and no general rule was laid down. (This case was also cited in

Franklyn v. Holmes, *infra* 1229; and from Serj. Hill's MS. of that case, vol. xx. p. 123. it appears that Lord Mansfield and Mr. Justice Buller said that the law was not settled as laid down in *Smith v. Goddard*, and seemed to question that opinion.

1778. farm has been raised only one-fifth in value within sixty or seventy years past.

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The counsel for the defendant then said, the cause was brought on by surprise upon them; that the issue was not delivered until the end of the term; that it was a considerable time before it was settled, and the assizes were so soon after, that they could not get a special jury struck, which they otherwise intended to have done.

Lord *Mansfield* upon this said, he thought, as it was a question of some consequence, the defendant ought to be at liberty to try it by a special jury; and so a new trial was granted upon payment of costs, with directions that it should be tried by a special jury, and nothing should be said of its being a new trial, so as to prejudice the question at all.

N. B. Mr. J. *Willes* was of opinion that the *modus* was rank.

The cause was tried a second time at the summer assizes, and a verdict for the plaintiff again.

Tr. 18 Geo. III. A.D. 1778. Scac.

Caley v. Williamson.

Savee v. Seller. [MS.]

If a plaintiff brings bills against two, where the question might have been determined upon one bill, and does not succeed, both bills will be dismissed with costs.
S. C.
4 Wood's Decr. 4.

THIS cause came on for further directions. It was a bill for subtraction of tithes. The defendants had in each cause set up a *modus* for the two farms of 10% payable half yearly, and had obtained a verdict. The only question was as to the costs. The defendants set down the cause, and alleged, that the bill ought to be dismissed with costs, because, besides the general rule, the plaintiff had been vexatious in bringing two bills, which made double expence necessary. The plaintiff alleged, that the defendants might have prevented that by moving to admit in one cause the evidence in the other; that it was a hard case, apparently a rank *modus*, the value of the estate 40 years ago being 120% only, and that plaintiff had a probable cause of litigation. But *per Cur.* Two bills are a reason for dismissing with costs. The bill was accordingly dismissed with costs (a).

[1124]

Tr. 18 Geo. III. A.D. 1778. Scac.

Vyse v. Duntze.

What certainty is necessary in the descrip-

THIS was a bill for vicarial tithes, to which *moduses* were set up for four farms. *Kenyon* objected to the manner of laying the *modus* for want of first stating, that "there is a certain ancient

(a) *Qu.* If this was not a hard case, and see 4 Wood's Decr. 4.

farm consisting of so and so," in order to apprise the plaintiff of what the claim precisely extended to. The answer only stated, *that the defendant is owner of an estate called H. and so on.*

Macdonald for the defendant said, that the certainty was supplied by the plaintiff's bill, which stated, that these four estates consisted of 200 acres, and the defendant admits himself to be owner of these estates with the qualification.

Heath Serjt. S. S. insisted, that it was not necessary to lay it more certainly, because it need not be proved; it would have been good if laid, "more or less;" if so, it is certain enough. It is not necessary to state the number of acres in particular.

Kenyon in reply said, it was convenient that certainty should be attained, because as it is to deprive the vicar of a quantity of tithe, it should be known what that quantity is. Nor is it certain taking the bill and answer together; because here are several *moduses*, and it is necessary to know to how much each particular *modus* applies. As to the park, it is always stated to be an ancient park. The word immemorial is applicable in the answer to the payment only, and not to the land. He cited *Burwell v. Coates*, *Bunb.* 129. as in point.

Lord C. B. The use of stating the number of acres is to ascertain the land: if it is ascertained by another means, the end is answered. The question is, whether that is here done? It is not so uncertain, as the case in *Bunbury*, for there only a farm was mentioned without a name. I therefore doubt upon it.

The other Barons thought that the name did not give sufficient certainty, and that it was not supplied by the bill.

The cause stood over with leave to amend.—Note, *Kenyon* thought it a very critical objection, and *Heath* found two or three authorities against it the next day; but the merits being against him, they were not mentioned (a).

1778.

Vyse
v.

Duntze.

tion in the
answer of
the lands to
which a
modus is
applied.
S. C.
4 Wood's
Decr. 587.

Supra 646.

Tr. 18 Geo. III. A.D. 1778. Scac.

[1125]

Philips v. Prytherick and others. [MS.]

LORD C. B. delivered the opinion of the court.—This was a bill brought for an account of tithes by the lessee of the bishop of *Lincoln* the rector of *Lanlley*, otherwise *Lanllney*, and the chapelry of *St. Michael* in *Roscorney* in the county of *Caermarthen*, against the defendant *Gwynne* the owner and others, who are the occupiers. The occupiers at first were the only defendants, and they set up

S. C.
4 Wood's
Decr. 73.
A prescrip-
tion by a
lay person
to pay 4l.
yearly as a
pension in

(a) Wood states that the objection was allowed, and that an account was decreed with costs, vol. 4. p. 587. on the description of lands covered by a *modus* in an answer, see *Croft v. Ayer*, *infra*

1325. *Richards v. Evans*, 1 Ves. 30. *supra* 802. *Willis v. Fowler*, *infra* 1242. *Bourke v. Isaac*, 2 Pri. 399. *infra*.

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lieu and
satisfaction
of the tithes
of his own
lands held
good.

a *modus* of 4*l.* in lieu of tithes; but it appearing that the persons to pay the *modus* were not specified, and also that the tithes themselves had actually been collected by the landlord, the court thought fit to require that the owner should be made a party in order to enable her to make a fuller defence. It was done accordingly: but she being an infant, and her first answer alleging only a *modus*, similar to that set up by the occupiers, leave was given to amend^(a) her answer, by stating her defence so as to correspond better with the facts in proof. In her amended answer she alleged that “she is seised in fee of certain lands called *Forest Glyn Cothy* situated partly within the chapelry of *St. Michael Roscorney* and partly in the parishes of *Berosha* and *Llanvillangen Yers* out of the said chapelry, and of three tenements within the said chapelry; and that she and all those whose estate she hath in the said three tenements and in so much of the said forest as lies within the said chapelry, hath and have from time immemorial paid to the rector of the said rectory and chapelry for the time being 4*l.* yearly, as a pension or payment in satisfaction of all tithes arising or renewing upon the said three tenements, and so much of the said forest as was situated within the said chapelry; and that she, and all those whose estate she hath, &c. hath and have from time immemorial been used to have, and ought to have in respect of the said pension or payment so paid, the tithe or tenth part of all corn, grain, hay, and other tithable matters arising upon the said three tenements, and so much of the said forest as lay within the said chapelry.” It was objected to this prescription, that no lay person can prescribe for tithes arising upon his own estate; for that if any agreement were made between rector and land-owner, that a gross sum or an annual payment should be made to him, and that the tithe should for ever after belong to the land-owner, the land would thereby become discharged of the tithe, and the tithe would from that time cease to exist. In support of the prescription was cited the case of *Piggot v. Simpson* in the 42 *Eliz. Cro. El.* 763. from which case this prescription was said to have been transcribed. To this it was answered, that *Piggot v. Simpson* differed materially from the present case, for in that the lord prescribed for tithe as appurtenant to his manor, arising upon the lands of others: here, the defendant prescribes for tithes arising upon her own lands. But as to this, the reasoning in *Piggot v. Simpson* is observable, *viz.* “for when the lord hath used from time whereof, &c. to pay this sum, &c. and in respect thereof to have all the tithe within his manor, it shall be intended that at the beginning the lord had all in his hands, and then might prescribe to pay a sum in discharge of all the tithes, and when he gave the tenancies to hold of

(a) The court of Exchequer have since refused to do this.

him, and always after to have the tithe of those lands, it is a very reasonable prescription, for now he hath no more than what he had before, *for he had them before by retainer, and now he takes the tithes themselves.*" Hence it appears, that two species of prescriptive rights were allowed by the court. 1st, To retain the tithes so long as the land remained in the original owner. 2d, To receive them after the lands were granted out. The tithes therefore are throughout considered as existing always distinct from the land, insomuch too that it is there said, that the lord might sue for them in the spiritual court. Nor was this case of *Piggot v. Simpson* the first decision upon this point: it had before been determined in *Piggot v. Hearn*, *Cro. Eliz.* 599. the reason on which the court had gone in that case is here stated. 'This of *Piggot v. Hearn* is also cited at the end of the *Bishop of Winchester's* case, *2 Co.* 45 *a.* where Sir *E. Coke* says, that two points were resolved therein. 1. That in such special case, a lay person, owner of the said manor, shall sue for the tithes upon all the special matter aforesaid in the spiritual court, for it shall be intended at the beginning, the lord was seised of the whole manor before the tenancies were derived thereout, and then by composition, or other lawful means, the lord should have all the tithes within the manor for the said pension paid to the parson; and the law intendeth that at the beginning it was for the maintenance of divine service, & *pro bono ecclesiæ*, the reason of which intendment is the continual usage *a tempore cujus*, &c. 2. That upon this special matter alleged, a man may have tithes as appurtenant to a manor; for he prescribes by a *que estate* in the manor, and therefore cannot have them in gross. But it is there said to have [1127] been adjudged in *Winchcomb's* case, *35 Eliz. Cro. El.* 293. that a man cannot prescribe generally in him and all those, &c. to have any tithes appertaining to the same, for without such special matter shewed, tithes, which are spiritual things and due *jure divino*, cannot be appurtenant to a manor or any other temporal inheritance. In *Piggot v. Simpson* the tithes must have been considered as existing always distinct from the land; if in his own hands, the lord might retain them; if in the hands of grantees, he might take them. Nor do I see any reason why they may not be prescribed for in the same manner as appurtenant to land, as well as appurtenant to a manor, the tithes themselves being constantly preserved by virtue of the supposed original agreement.

Upon this ground it appears to me that the prescription may be good in law; and as some evidence has been given to support it in fact, much of the payment of the pension, some of the collection of tithes by the land-owner, an issue ought to be directed to try it. And if it should be found by the jury, that the pension is payable in discharge of tithes, but they should find against the second branch

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v.
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Supra 200.

Supra 167.

Supra 164.

1778. of the prescription, viz. that the landowner has a right to take the
 tithes, then such finding may be indorsed upon the *postea*.
Philips
 v.
Prytherick. Issues were accordingly directed.

“ First, whether she, the said *Elizabeth Gwynn*, and all those whose estate she hath in the three several tenements or farms in the pleadings of this cause mentioned, called by the several names respectively of *Breehva*, *Llystin*, and *Maes y Grove*, situate, lying, and being within the chapelry of *St. Michael* in *Roscorney* in the county of *Caermarthen*, and in such part of a certain ancient capital tenement and demesne lands called *Forest*, as lieth within the said chapelry, hath and have, from time whereof the memory of man is not to the contrary, paid to the rector of the said rectory of *Llanlley*, otherwise *Llanlloney*, and the chapelry of *St. Michael* in *Roscorney* aforesaid, for the time being, the sum of four pounds yearly, as a pension or payment in satisfaction of all tithes arising or increasing upon the said three tenements or farms, and upon so much of the said forest demesne lands as is situate within the said chapelry.”

“ Secondly, whether she the said *Elizabeth Gwynn*, and all those whose estate she hath in the said three several tenements or farms, and in the said part of the said forest demesne lands, hath and have, from the time whereof the memory of man is not to the contrary,
 [1128] been used to have, and ought to have, in respect of the said pension or payment so paid to the said rector for the time being, the tithes or tenth part of all corn, grain, hay, and other tithable matters arising on the said three tenements or farms, and on so much of the said forest demesne lands as are situate within the said chapelry.”

The defendant *Gwynn* to be plaintiff at law; the issues to be tried by a special jury; and the judge to indorse, &c. &c.

The said issues were accordingly tried, and the jurors found for the plaintiff at law.

The court, on the 5th of *July* 1779, ordered the bill to be dismissed with costs at law only; the plaintiff in equity to deduct thereout the arrears of the pension of four pounds a year.

M. 19 Geo. III. A. D. 1778. B. R.

Manser v. Taylor. [Serjeant Hill's MSS. vol. xxxii. p. 218.]

The stat.
 7 & 8 W. 3.
 c. 34. for
 the reco-
 very of
 tithes from
 Quakers
 does not
 oust the

PROHIBITION prayed to the official of the Consistory Court of the Bishop of *Norwich*, where defendant had libelled against plaintiff for tithes.

The suggestion for prohibition was that by stat. 7 & 8 W. 3. c. 34. it is enacted, that “where any Quaker shall refuse to pay or compound for his great or small tithes, or to pay any church rates, it

shall and may be lawful for the two next justices of the peace, on complaint of any person, &c. to whom the same are due, to convene before them such Quaker, and to examine on oath such complaint, and state what is due by such Quaker to the party complaining, and by order under their hands and seals to direct and appoint the payment thereof, so as the sum ordered do not exceed 10*l.*; and on refusal to pay, any one of the said justices may, by warrant, levy the same by distress, &c." And the case was, that the defendant had complained to two justices (as the act directs), who convened the plaintiff, and after hearing both sides, stated the debt due from plaintiff to defendant to be 30*s.*, and were proceeding to make order that plaintiff should pay defendant the same, and then offered to grant defendant a warrant on refusal. But the plaintiff thinking that the justices had not truly stated this debt, and that he ought to have more, told the justices that they need not proceed further, but he would seek redress another way; whereupon the justices made no order, and the defendant immediately libelled against the plaintiff in the ecclesiastical court. The fact thus appearing to the court, two points were made on this act of parliament; 1st, Whether the act does not in all cases, where the debt is under 10*l.*, take away the jurisdiction of the ecclesiastical court; and in order to this the counsel *pro* and *con* urged that in many acts these words, "it shall and may be lawful," amounted to a command and injunction, and insisted that they should receive that sense here: but *per Cur.* the parson has it in his election whether he will take the method the act empowers him, or sue in the ecclesiastical court, whose jurisdiction is not taken away. The 2nd point, which was chiefly insisted on was, whether since the defendant made his election to pursue the statute, and the proceedings before the justices were so great as to determine the debt, if he could after this sue in the ecclesiastical court for the same; and *per cur.* the justices have not made any order in writing. There is no determination of the matter on record, wherefore the defendant was at liberty to go into court christian; but *aliter* if the justices had by making order determined the matter. Prohibition denied. (a)

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Maner
v.
Taylor.

jurisdiction of the ecclesiastical court. Although a party has commenced proceedings before two justices under the act, he may, if the order has not been made, elect to proceed in the ecclesiastical court.

M. 19 Geo. III. A. D. 1778. In Canc.

Devie v. Lord Brownlow and others.

THE plaintiff was vicar of the church of *Stanground* with *Farcet* in the county of *Huntingdon*, (into which he was inducted in July 1766), and the defendant lord *Brownlow* was impropriate rector of the same church. The rectory impropriate of the same church

S. C.
7 Bro.
P. C. 83.
(2d ed.)
Under what circum-

(a) See also *R. v. Owen*, *supra* 938.

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*Lord
Brownlow.*

stances a new trial of an issue directed to try a vicar's right to tithes ought to be refused, especially where the greatest and most material part of the evidence is in writing of which the court directing the issue was a proper judge, and where there is no reason to suppose that any further light can be thrown upon it by another reference to a jury.

*[1129]

was formerly part of the possession of the abbey of *Thorney*, and by endowment of 11 *April* 1402 the abbot and convent of the said abbey granted to the vicar of the said church, all tithes, tenths, oblations, and offerings whatsoever belonging to the said church, except the tithe of corn, hay, wool, lambs, and calves. At the time of the dissolution of the said abbey, the vicar, by virtue of a further endowment by the said abbot and convent (supposed to have been made 22 *H. 6.*) was endowed with, and enjoyed a portion of one-third of tithe-corn, arising within the limits or hamlet of *Farcet*, which is a separate vill, but parcel of the said parish of *Stanground*, sir *Walter Mildmay* knight, chancellor of the Exchequer (to whom queen *Elizabeth* had then lately granted the impropriate rectory of *Stanground*), by indenture, dated 24th *October*, 30 *Eliz.* granted to the master, fellows, and scholars of *Emanuel College* in *Cambridge* (which sir *Walter* had founded, and to which he gave the advowson of the said vicarage), and their successors for ever, in trust for the vicar of the said parish, amongst other things, "all the tithes of wool, lamb, and calf, arising within the parishes, towns, and hamlets of *Stanground* and *Farcet*, (except the tithes of wool, * lamb, and calf, arising from the demesne lands and tenements of the manor of *Stanground*, then in the occupation of *Henry Parkinson*, or his assigns); and after taking notice that the vicar then had only one-third part of the tithe-corn in *Farcet* (the other two-thirds thereof belonging to him the said sir *Walter Mildmay*, as impropriator) he granted to the said master, fellows, and scholars, one-fourth of his two-third parts of the said tithe-corn; so that the said vicar should thenceforth have and enjoy one full moiety of all the tithe-corn arising in the said hamlet of *Farcet*. By a further indenture, dated 11th *April*, 31 *Eliz.* the said sir *Walter Mildmay* conveyed to the master, fellows, and scholars of the said college, and their successors, in trust for the said vicar, the other moiety of the tithes of corn in *Farcet*.

By virtue of these several endowments and grants, the plaintiff, as vicar of the said church, claimed, 1. The tithe of corn, and all other tithes (except hay) throughout the hamlet of *Farcet*. 2. The tithe of wool, lambs, and calves, and all other the small tithes throughout the vill or township of *Stanground* (except the tithe of wool, lamb, and calf of the manor farm or demesne of *Stanground*, called the *Buristed*, formerly occupied by *Henry Parkinson* and his assigns.)

Farcet, though united as a parish with *Stanground* under one church, is, in all other respects, distinct from it, both as a manor and a township. The town (which has a chapel of ease) is situate at the distance of upwards of a mile from that of *Stanground*, has a separate parish, and civil officers; and the manor is, in all respects,

distinct from and independent of that of *Stanground*. The parish borders upon, and a large proportion of the lands belonging to the two townships extend into the great level of the fens called *Bedford Level*, which, till the improvements thereof, by drainage and inclosure in the reign of *Car. 1 & 2.* lay in a state of inundation, during the greater part of the year, and wholly unproductive (except a species of coarse grass and hay upon some particular spots), but in consequence of the drainage, &c. became, and has since continued fit for culture, and produced corn, and other tithable matters. Within the parish of *Stanground*, and adjacent to the township and common field lands of *Farcet*, lies a large tract of fen land, distinguished and bounded as after-mentioned, and containing, by estimation, 3360 acres, or thereabouts, anciently and still known by the denomination of "*Farcet Fen*," and reputed to be parcel of the manor and hamlet of *Farcet*. The remainder of the fen lands within the parish lie within, and have been always considered as [1130] parcel of, the township of *Stanground*.

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The tract called *Farcet Fen* is bounded as follow, *viz.* Towards the north-west, by the common lands, in the vill of *Farcet*, from which it is divided by a river, called *Farcet Water*. Towards the north, by lands in *Stanground*, called *Horseley Grounds*. Towards the north-east, by lands in *Whittlesey*, called *Whittlesey King's Delf*, from which it is divided by a dyke, called *Hockey or Oakey Dyke*. Towards the south-east, by fen lands in *Ramsey*, called *Middlemore*, from whence it is divided by a dyke, called *Small Dyke*. Towards the south, by the lake of water, called *Whittlesey Meer*; and to the south-west, upon lands in *Yaxley*, from which it is divided by a dyke or stream, called *Conquest Load*.

Anciently, and long before the general drainage of the fens took place, certain parcels of land had been fenced off from the residue of *Farcet Fen*, and held in severalty for the purpose of mowing hay; the remainder (when not covered with water) as also the inclosed parcels after having been mowed, were used as an open common. The largest of the meadows thus inclosed, which lay on the north-east side next *Oakley Dyke*, and contained 500 acres, was (and is still) called *Farcet King's Delf*, and eight roods, and was subdivided into small parcels (containing about four acres a-piece) called *Doles*, which were allotted to, and held in severalty by sundry inhabitants of *Stanground* and *Farcet*, (probably) in respect of their rights of common in the fen. Another of the said meadows, lying on the north-west side, and containing about thirty acres, was (and is still) called *Milby*. Another of the said meadows, lying on the same side, and adjacent to the last, containing about forty acres, was (and is still) called *New Mead*. Sundry other small parcels, inclosed in like manner, lying on the same side, were (and are now)

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called by the name of the *Pingles*. At the southern extremity of the fen adjoining to *Whittlesey Meer*, a cottage called *Beales Cote*, was anciently built, and ten acres of land were inclosed to and have ever since been held in severalty with it.

The abbot of *Thorney*, to whom both the manors of *Stanground* and *Farcet* belonged, held in severalty (at the time of the dissolution) another inclosed parcel, containing about 140 acres, (lying on the south-west side of the fen next *Conquest Load*) called *Conquest Close*, extending from *Fowle Lake* in *Whittlesey Meer* to *Farcet Water*. The remainder of the fen was, till the period after-mentioned, an open common, into which the tenants and inhabitants [1131] in sundry neighbouring and some distant manors (which belonged to the same abbey) had a right, by custom, of turning their commonable cattle, making a yearly acknowledgement for the same to the lords of the manor of *Farcet*.

In 10 *Eliz.* the said sir *Walter Mildmay*, to whom the manor of *Farcet* had been then granted in fee (and who was then lessee of the crown for sixty years of the manor of *Stanground*) came to an agreement with the commoners in the said fens, whereby he gave up his right of common and herbage therein, in consideration of being permitted to inclose and hold in severalty to him and his heirs 400 acres of the said fen adjoining to the said parcel (formerly inclosed by the abbot) called *Conquest Close*, and such 400 acres were in consequence of such agreement inclosed, and have been ever since held in severalty with and as parcel of the manor of *Farcet*.

The remainder of the fen lay open waste, till the drainage of the fens took place in the reign of *Charles the First*. By the terms of their undertaking, the adventurers for the drainage were to have 95,000 acres (being the proportion of one third of the whole level) set out to them from all the lands common and several within the level, and the same were allotted to them accordingly by a law of sewers, (since called the *Saint Ives Law*), made on 12 October, 30th Car. 1. whereby 940 acres, further part of the then common fen of *Farcet*, situate on the southern side next *Whittlesey Meer* and *Ramsay* fen, and 162 acres out of *Conquest Close* and lands, and three acres, one rood, ten perches, out of the lands belonging to *Beales Cote* were set out, and afterwards inclosed, and held in severalty, as the full proportion of the adventurers of the whole of *Farcet Fen*, including the said meadows of *King's Delf*, *Milby*, *New Mead*, and the *Pingles*, out of which no allotments were taken.

In the year 1682, the remainder of the said fen, which contained 1,300 acres, was, by virtue of statute 15 Car. 2. c. 17. intituled, "An act for settling the drainage of the great level of the fens called *Bedford Level*," divided and allotted to the several persons having right of soil and common therein, in proportion to such their respec-

tive rights, and afterwards inclosed and held in severalty by them ; and thirty-five acres were on that occasion allotted to *William Brownlow* esq. as lord of the manor of *Farcet*, and (as such) owner of the soil of the said fen, in lieu of his seignory.

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Soon after the commencement of the drainage, when a prospect opened of the fen lands becoming productive, the right of tithes therein became an object of attention and dispute, and the inclosed fen lands in *Stanground* and *Farcet*, then held in severalty, being first improved and rendered capable of yielding tithable matters, the vicar of *Stanground*, some time before the year 1640, asserted his claim to such tithes of those lands, as by his endowments and grants he was entitled to. The then impropiator, *Mildmay* earl of *Westmoreland*, at first resisted the vicar's demand ; but after a suit commenced by the vicar in the ecclesiastical court, entered into a compromise, and by agreement, made in the year 1640, consented to allow him twenty-five pounds a-year in lieu of and as a composition for the tithes of the said inclosed fen grounds, which payment hath been continued to be made by the succeeding impropiators to the successive vicars, from that time down to *Lady-day* 1773. Sundry disputes afterwards arose respecting the tithes of the 940 acres, allotted to the adventurers, and the 1,300 acres, allotted to the commoners, as well between the impropiator and the owners, as between the impropiator and the vicar of *Stanground*, and several suits were commenced, and some of them brought to trial in consequence thereof ; but before any final decision of the right took place, these disputes also terminated in the year 1688, in a compromise between the impropiator and vicar, the former consenting to accept, and the latter to grant, a lease of such tithes in the said lands as the vicar was entitled to, at the rent of fifty pounds a year, which hath been continued to be regularly paid under that and subsequent leases by the succeeding impropiators, and accepted by the successive vicars from thence to *Lady-day* 1773. [1132]

The first lease bears date 30th *May* 1688, and was granted by *Joshua Ratcliff*, then vicar, to *William Brownlow* esq. then impropiator, for the term of five years ; a further lease, dated 26th *May* 1691, on the same terms, was granted by *Samuel Doughty* clerk, then vicar, to the said *William Brownlow*, for the term of five years ; and a third lease, bearing date 26th *May* 1751, was granted by *William Whitehead* clerk, then vicar, to sir *John Brownlow* bart. lord viscount *Tyrconnel*, then impropiator, for fifteen years.

The payments of twenty-five pounds, and fifty pounds a-year, bearing no reasonable proportion to the value of the tithes in lieu whereof they were paid, and the plaintiff conceiving himself justly entitled to receive those tithes in kind, or a fair composition for

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the value thereof, gave due notice to the defendant, that he would not accept the payments in question after *Lady-day* 1773, but would thenceforward take the tithes in kind, and the defendant * lord *Brownlow* disputing his title to, and withholding the payment of such tithes, the plaintiff, on 21st *January* 1774, filed his bill in the court of Chancery against the said lord *Brownlow*, and against *Thomas Mewburn, George Richardson, Sanderson, Henry, William Blackwell, Ralph Speechley the younger, David Bowker, James Arnold, and John Kingston*, (occupiers of lands and tithes in *Farcet Fen*, and of inclosed fen lands in *Stanground*, as tenants to the said lord *Brownlow*) and against *William Chapman, Robert Johnson, and Daniel Plummer*, (other occupiers of land in *Farcet Fen*, as tenants to sir *Samson Gideon*), and against the master, fellows, and scholars of *Emanuel College, Cambridge*, stating (amongst other things) that by virtue of the said several endowments and grants, or by virtue of some prescription from time immemorial, or some usage, the plaintiff, as vicar of the said church, was entitled to all and singular the tithes of wool, lambs, calves, corn, grain, and hay (except the tithes of hay of the meadows of *King's Delf, Milby, and New Mead*) arising within the said village, town, and hamlet of *Farcet*, and to all tithes of wool and lambs (except the tithes of wool and lambs of the *Burested* or manor-house) throughout the hamlet of *Stanground*, and to *Easter* dues and offerings and the tithes of wood and reed, and all other small and vicarial tithes whatsoever, arising within the said parish of *Stanground*, and the several manors, villages, and hamlets of *Stangroand* and *Farcet* aforesaid, and the tithable places thereof; and charging, that the said defendant *Thomas Mewburn*, and the other defendants the occupiers, had, from and since *Lady-day* 1773, severally holden and occupied sundry lands in the several parts of *Farcet Fen*, and in the fen lands and inclosed grounds of *Stanground* therein specified, and had taken all the tithes thereof and of other lands therein mentioned, which were of right payable and belonged to the plaintiff, and refused to pay or account to him for the same; and that the defendant, lord *Brownlow*, as lay rector or impropriator of the said church, disputed the plaintiff's title to the said tithes, and that the said master, fellows, and scholars refused to join with the plaintiff in the said suit, or to assist him in the recovery of the said tithes; and therefore praying that the said defendants, the occupiers, might account with and make satisfaction to the plaintiff for the single value of all and every the said tithes so by them withheld or subtracted; and that the plaintiff's right and title, as vicar of the said church, to the said tithes,

1134] might be established against all claims and demands of the defendant lord *Brownlow*, as lay rector and impropriator thereof, and

that the said defendants the master, fellows, and scholars might be decreed to act as trustees for the plaintiff's benefit, and for general relief.

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The defendant, lord *Brownlow*, on 18th *June* 1774, put in a plea in bar to the discovery and account sought by the bill, that he was impropriator of the rectory of the said church, and therefore not bound to make such discovery.

The said defendant at the same time put in his answer to the remainder of the bill, and thereby insisted, that the plaintiff had no title against him, as impropriator, to any tithes arising within the said parish, over and besides such as the plaintiff had then before taken and enjoyed, and not admitting, but on the contrary, disputing the plaintiff's title (and reserving to himself such right as he should be able to make out as impropriator against the plaintiff) as vicar, to such tithes, as he had since his institution and induction taken without dispute or controversy.

The said defendant, *Thomas Newburn*, and the other defendants the occupiers, put in similar pleas in bar to the discovery prayed by the bill, and filed answers to the remainder of the bill 8th *July* 1774.

The said pleas were argued before the Lord Chancellor, 19th *December* 1774, and over-ruled, and the plaintiff having taken exceptions to the said answers, and afterwards amended his bill, the said defendants were ordered to answer the exceptions and amendments together.

The said defendants accordingly, in *Hilary* vacation 1776, put in their further answers to the original and amended bill, and the answer of the defendant lord *Brownlow* being again excepted to and reported insufficient, the said defendant, 6th *March* 1777, put in a further answer to the said amended bill.

The said defendant by his said answer disputed the existence and validity as well of the ancient endowments, as of the grants of sir *William Mildmay*, and put the plaintiff to the proof of his title against the said defendant lord *Brownlow*, as impropriator, not only to the tithes really in dispute, but to all the tithes belonging or which had uninterruptedly been enjoyed as parcel of the vicarage.

The defendants, the occupiers, by their further answer discovered the lands in their respective tenures, and rendered an account of the tithes arisen therefrom since *Lady-day* 1773. [1135]

The master, fellows, and scholars of *Emanuel College* put in their answer, stating the grants of sir *Walter Mildmay*, and submitting to produce them in support of the plaintiff's title.

The plaintiff having replied to the answers, and entered into proofs in support of his claims, the cause came on to be heard in

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Michaelmas term 1778, before the Lord Chancellour, and the defendant lord *Brownlow* then (as he had done before by his answers) set up his title as impropiator to all the tithes of the rectory, which could not be proved to have been legally granted or taken from it, and refused to admit that the plaintiff was entitled to any tithes whatsoever, but insisted on putting in issue the whole of his claims as well under the ancient endowments as under the grants; whereupon the court, on 5th *December* 1778, decreed, that the parties should proceed to a trial at law, at the assizes to be holden for the county of *Huntingdon*, by a special jury, on several issues, which (as afterwards settled by the Master) were as follows, viz.

1. Whether the plaintiff, as vicar of the parish of *Stanground cum Farcet*, was entitled by endowment, prescription, grant, or otherwise, to all other tithes, except the tithes of corn, grain, hay, wool, lambs, and calves, growing, renewing, or accruing in, upon, or out of the lands in the said parish, which have been in the occupation of the defendants to the bill respectively, since *Lady-day* 1773.

2. Whether the plaintiff, as vicar as aforesaid, or the master, fellows, and scholars of *Emanuel College*, in trust for him, was or were entitled by endowment, prescription, grant, or otherwise, to the tithes of wool, lambs, and calves, growing, renewing, or accruing, in, upon, or out of the lands which had been in the occupation of the several other defendants respectively at any time since *Lady-day* 1773.

3. Whether the lands called *King's Delf*, *Eight Roods*, *Conquest Lands*, *New Meadow*, *Milby*, the *Pingles Berkleys*, or the *Adventurers Lands*, and *Farcet Common Fen*, out of which the plaintiff by his bill sought tithes, lay within the common of *Farcet*.

4. Whether the plaintiff, as vicar as aforesaid, or the said master, fellows, and scholars, in trust for him, was or were entitled by endowment, prescription, grant, or otherwise, to the tithes of corn and grain, growing, renewing, or accruing, in, upon, or out of the [1136] lands in the occupation of the other defendants to the said bill respectively in the hamlet of *Farcet*.

5. Whether the plaintiff, as vicar as aforesaid, was entitled by endowment, prescription, grant, or otherwise, to one third part of the tithes mentioned in the last issue.

6. Whether the master, fellows, and scholars of *Emanuel College*, *Cambridge*, were entitled by endowment, prescription, grant, or otherwise, to two third parts of the same tithes.

The said issues came on to be tried on 29th *July* 1780 at the assizes at *Huntingdon* before Mr. Justice *Willes* and a full special jury, five of whom had taken a previous view (under the rule of

the court of King's Bench) of the lands in question, and after a trial, which lasted two entire days, the jury returned the following verdicts on the several issues, viz.

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On the first issue for the plaintiff generally.

On the second issue for the plaintiff, (except as to the lands called *Berrystead Farm*.)

On the third issue for the plaintiff, (except sixty doles, part of the lands called *King's Delf*, which the jury found to be within the hamlet of *Stanground*.)

On the fourth, fifth, and sixth issues for the plaintiff generally.

In *Michaelmas* term 1780, the defendants applied to the court of Chancery that the above verdict might be set aside, as contrary to law and also to evidence, and that a new trial might be had of the issues; and the matter of the said motion being argued on several days, and for the last time on 5th *March* 1781, stood over for judgement; and on 28th *May* 1782, the Lord Chancellor rejected the application, and refused to make an order for a new trial of the the said issues or any of them.

From this decision the defendants appealed to the House of Lords, upon the following grounds:

The verdict is contrary to the truth and justice of the case in many material parts, and as to some of them, founded upon the misdirection of the judge in matters of law.

1. With respect to the respondent's right to the tithe of corn, it appears on his own shewing, by his title under the last of sir *Walter Mildmay's* grants, that his right was to tithe-corn, in the hamlet of *Farcet*, with an exception (and that too very extensive); but the jury have found his right to tithe-corn in that hamlet, without any exception whatsoever.

The injustice of the verdict in this material part of the case is [1137 so apparent, that the vicar now (for the first time) resorts to the extraordinary expedient of attempting to maintain, that the exception ought to be expunged out of his own title-deed, as being inserted by mistake of the drawer. This never was thought of till near 200 years after the date of the deed, and cannot be worthy of an answer, after the admission of the exception in the words of it, both by the college and the vicar, recorded in their answers in Chancery in 1685, which were read at the trial; and the only question then was, as to the quantity of lands comprized in the exception.

2. The jury have found, that all the lands in the third issue, except sixty doles of *King's Delf*, lie in the hamlet of *Farcet*, and have found, on other issues, that the vicar is entitled to tithes of corn throughout the hamlet of *Farcet*; so that as the verdict now

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stands, the vicar is found to have a right to tithe-corn over all the lands in the third issue, except the sixty doles in the *King's Delph*; whereas it was not proved, that all those lands are in the hamlet of *Farcet*; and as *Stanground* is the mother church, the presumption is, that lands in that parish are not within the chapelry or hamlet, unless proved so. But the judge not only admitted modern evidence to prove lands to lie in the hamlet, which by the true construction of the statutes 15 *Car. 2. c. 17. s. 6. 52.* and 17 *Geo. 2. c. 37.* ought not to have been admitted, but also allowed various papers not signed by any person, as evidence, though the same was opposed by the appellant's counsel. And with respect to *Farcet Fen*, it appeared by the recital in the last of the vicar's leases that only part of it lies in the hamlet of *Farcet*, and yet the jury have found the whole to lie there, and have thereby rejected that part of the recital, notwithstanding other parts of that recital were ruled by the judge to be decisive, as to other matters against the appellant. And it was clearly proved by the crown receiver's accounts, and by royal grants of *Stanground* manor, and also by old depositions, that *Farcet Fen* was part of the demesnes of the manor of *Stanground*, and yielded some profit, even before the drainage, to the lord of that manor, notwithstanding it was subject to right of common; and therefore such part of it as lies in the hamlet of *Farcet*, is within the exception in sir *Walter Mildmay's* last grant; and by the common law the master and commons of every manor, whether they afford profits to the lord or not, are part of his demesnes; but the judge was of a contrary

[1138] opinion, and declared to the jury, that *Farcet Fen* was not part of the demesnes, because not reserved (as he said) for the lord's use; which was a misdirection in point of law, and also in matter of fact; and not only *Farcet Fen*, but such other lands in this issue, except to the old *Conquest Close* and some of the eight roods, and some few other small pieces, which were proved to be in the manor of *Farcet*, appeared by evidence of enjoyment, and acts of ownership by the lords of *Stanground*, and by reputation, and otherwise, either to be part of the demesne lands of *Stanground* or else to be part of the other lands in the exception; and therefore as to all these the verdict, as found, without any exception, is unjust, even supposing the right to the tithe-corn in question was now open to litigation. But

3. The right to tithe-corn in most of the lands, in the third issue, has been often contested, and sometimes decided by verdict in favour of the rector, and at other times ended in nonsuit of the college; which nonsuits by old depositions and otherwise appear to have been on the merits, without a single instance, till now, of any

suit wherein the rector failed, or wherein the vicar or college, or any other opposing the rector, ever succeeded.

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The rectors have ever since enjoyed the corn-tithe of these lands, without any demand by the vicars; for as to part, they were not included in any of the leases made by the vicars to the rectors; and as to those lands, the tithes of which were included therein, the leases are in such terms as do not extend, nor could be meant to extend, to any but small tithes, as the vicar was entitled to. And as to the payment of twenty-five pounds a year, that could not be for the corn-tithes in litigation, because it is admitted to have commenced before, and to have continued during all former litigations, as well as ever since; and besides, it is too low for a composition commencing any thing like so late as 1640, for all the tithes now claimed by the vicar over so extensive tracts of land. And therefore it is submitted, that the claim of the respondent, as to tithe-corn of any of those lands, is concluded and barred by former determinations, and constant enjoyment under them. But, supposing the length of time not conclusive against the respondent, then by the same rule it cannot be so against the appellant; consequently, the validity of the grants is still open to all legal objections, and several such objections were insisted on at the trial, as proper to be argued, if the case was not concluded; but the judge would not enter into any consideration about them.

4. That part of the parish, which lies in *Cambridgeshire*, ought to have been excepted in the verdict on all the issues.

Because the only written evidence on the first issue was not an original, but an entry of the substance or import of an endowment, which made it necessary, in support of the vicar's title, to prove enjoyment under it, which he did, by two or three living witnesses, who had collected small tithes. But all of them agreed that no tithes of any kind whatever had been collected or demanded by, or were due to the vicar for that part of the parish which lies in *Cambridgeshire*; and both sir *Walter Mildmay's* grants are in such terms, as, by legal construction, do not extend out of the county of *Huntingdon*, and the construction is confined by usage; and therefore the not excepting that part of the parish which lies in *Cambridgeshire* out of the verdict on all the issues, is manifestly unjust, by extending the vicar's claims over large tracts of lands, of which there was no enjoyment since the creation of the vicarage in any of the respondents predecessors.

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5. It appeared at the trial, by the testimony of living witnesses, and by the old depositions, that *New Meadow* is discharged from all tithes, in consideration of a tithe-acre immemorially enjoyed by the rectors in lieu of the tithes thereof; and as the locality of that meadow makes part of the third issue, and it is found to be in the

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hamlet of *Farcet*, therefore the same and the tithe-acre ought to have been excepted in the verdict on all the issues.

6. The construction of the words "*garbarum cujuscunque generis*" and "*bladorum fœnique*" in the exception of tithes in the endowment of 1402, was misunderstood at the trial. It was then and is now humbly insisted, that by the legal import of the word *garbæ*, tithes of wood, as well as of corn and grain, are included, unless restrained by usage, or the context; but in this case there was no instance proved of payment of tithe-wood to any vicar; and the context, so far from restraining the sense of the word, plainly shews it was intended in the largest sense; yet, as the verdict now stands, the vicar is entitled to tithe-wood contrary to an established principle of law, "that a vicar cannot be entitled to any particular species of tithe, otherwise than by endowment or prescription, and that all others by law belong to the rector." The respondent's bill is to establish his right as vicar against the appellant, the rector, to all tithes claimed to be due to him by the bill, of which tithe-wood is one; and therefore, whether there is now any tithable wood in the parish or not, or whether the charge in the bill be true or not, that *Farcet Fen* was anciently part of the king's forests, and known by the name of *Farshevid Ferry*, yet as the bill is to establish

[1140] the vicar's right to all the tithes mentioned in his bill, the right to tithe-wood ought to have been excepted out of the verdict on the first issue.

7. The judge neglected taking any notice of the word *bladorum* in the exception, though it was at the trial, and is now humbly submitted, from the obvious import of it, as well as from the context, to mean tithe of grass or corn depastured by cattle, or cut green, and before ripe, and given to cattle; which includes agistment-tithe, and also tithes of grass and of corn, vetches, tares, and other grain or pulse, when cut green and given to cattle; and therefore these species of tithe ought also to have been excepted out of the verdict on the first issue.

8. The respondent's right to tithe-corn in any particular part of the parish depends upon two facts; the one, that such part lies within the hamlet of *Farcet*; the other, that it is not part of the demesnes of the manor of *Stanground*, or of the other excepted lands. The respondent found it impossible to support this claim over the lands in the third issue, without assuming a fact (which he had no right to do without proof) that the manor and hamlet of *Farcet* are co-extensive. But in this case, there was not only no proof at all of it, but clear proof to the contrary, besides demonstration on the face of the respondent's own title deed, which expressly excepts demesne lands of the manor of *Stanground* out of the grants of tithes

of lands in *Farcet*. This was urged to the judge by the appellant's counsel who requested him to take notice of it to the jury, which he did not, but suffered the evidence, as to any piece of land being in the hamlet, to be evidence, that it was in the manor and so on the reverse.

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In answer to these reasons urged by the defendants, the plaintiff, the respondent, detailed the evidence produced at the trial.

State of the evidence produced by the Respondent on the trial of the issues.

In support of his case under the first and fifth issues, he produced,

1. An endowment registered in the old register of the bishop of *Lincoln*, preserved amongst the archives of the diocese, in the registry of *Lincoln*; this endowment is dated 11 *April*, 1402, wherein, after assigning a mansion house, and thirteen acres of land in *Stanground*, to the vicar, the abbot and convent of *Thorney* make the following grant, viz. “*Item habebit dictus vicarius, qui pro tempore fuerit, pro portione sua, in perpetuum, omnes fructus redditus et proventus, decimasque et oblationes universas ad eandem ecclesiam qualitercunque provenientes, et pertinentes; decimis garbarum cujuscunque generis, bladorum, fœnique ac lanæ, et agnorum et vitulorum (quoties vitulus decimus in specie fuerit solvendus) ad eandem ecclesiam qualitercunque provenientium, necnon glebâ et manso rectoriæ ecclesiæ duntaxat exceptis; quæ ad religiosos hucque ut ipsius ecclesiæ proprietarios, in perpetuum pertinebunt salvo habitatione vicariæ et scitu ejusdem superius designat.*” [1141]

2. A duplicate or ancient copy of the same endowment, found in the registry of the bishop of *Lincoln* at *Bugden* in *Huntingdonshire*, on which appeared an indorsement in the following words: “*viz. Ecclesiæ sancti Johannis Baptistæ de Stanground, appropriet. taxatur ad xxl. inde decimæ viiil.*” *vicarius ecclesiæ parochialis de Stanground, percipiet omnes decimas preterquam decimas garbar. granorum et fœni vitulorum et agnorum per compositionem et ordinationem decani Lincoln: tamén nuper dominus Johannes Kirketon abbas anno regni Hen. 6. 22do. augmentavit portionem dictæ vicariæ conferendo eidem tertiam garbam decimis granorum in campis de Farshed ut de cetero nullatenus annumeret.*”

3. A passage from the appellant's second answer, admitting that the yearly sum of twenty-five pounds had been paid by the lord of the manors of *Stanground* and *Farcet*, for the time being, and accepted by the vicars for the time being, ever since the year 1640 up to *Lady-day* 1773, but denying the defendant's knowledge on what account the payment was made.

4. The respondent proved by *Robert Bellamy*, a living witness,

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the receipt, by the present vicar, of the small tithes throughout the parish of *Stanground*, except of the inclosed fen lands, lying in that part of the parish which is in *Cambridgeshire*.

Upon the second, fourth, fifth, and sixth issues he produced,

[1142] First, an indenture dated 24th October 30 *Eliz.* between sir *Walter Mildmay* knight, chancellor of the Exchequer, &c. of the one part; and the master, fellows, and scholars of *Emanuel College*, of the other part; whereby, after taking notice (amongst other things) that the provision for the vicar of *Stanground* was not sufficient for his maintenance, and that sir *Walter*, being proprietor of the rectory and patron of the vicarage, was minded to make such provision for him as is therein mentioned; the said sir *Walter*, in consideration thereof, and for other the considerations therein mentioned, granted, bargained, and sold to the said master, fellows, and scholars, 1. The parsonage house and a close called *Parson's Croft*, and the glebe lands thereunto belonging; and 2. " All those his tithes of wool, lamb, and calf, yearly and from time to time coming, arising, and renewing within the parish, town, and hamlets of *Stanground* aforesaid and *Farcet* in the said county of *Huntingdon* (except and always reserving to the said sir *Walter Mildmay*, his heirs and assigns, all and all manner of tithes of wool, lamb, and calf, yearly, and from time to time coming, arising, happening, or growing out of, for or by reason of the demesne lands and tenements of the said manor of *Stanground*, then in the occupation of *Henry Parkinson* or his assigns); and after reciting, that the then vicar, and his predecessors, had but only one third part of the tithe of corn in *Farcet*, the whole in three parts being divided, and the proprietor or owner of the said parsonage of *Stanground* aforesaid, the other two third parts of the said tithe-corn (of which two third parts the said sir *Walter* was seised in his demesne as of fee, as part of the said parsonage of *Stanground*), the said sir *Walter*, for the considerations aforesaid, granted and confirmed unto the said master, fellows, and scholars, one fourth of all his said two third parts of all the said tithe-corn, which from time to time should be coming and renewing within the said town, fields, or hamlet of *Farcet* aforesaid (being part of the said rectory of *Stanground*), the which fourth part of the said two third parts, together with the said other third part of the said tithe-corn there, which the vicar of *Stanground* then had and enjoyed, would amount together to a full moiety of all the tithe-corn renewing in the said town, fields, and hamlet of *Farcet* aforesaid, and growing due to the parsonage or vicarage of *Stanground* aforesaid, in such sort as whereas the then vicar and his predecessors had but one third part of the said tithe-corn in *Farcet* aforesaid, the said master, fellows, and scholars, and their successors, and the said vicar and his suc-

cessors, should have (their portions being laid out or taken together) one moiety of all the said tithe-corn in *Farcet* aforesaid. And the said sir *Walter Mildmay* also granted to the said master, fellows, and scholars of *Emanuel College*, 3. All that the advowson, presentation, and rights of patronage of the vicarage of *Stanground* aforesaid (except and always reserving to the said sir *Walter* and his heirs or assigns, all the rents and yearly profits reserved and limited to be paid for the said tithe-corn, upon one lease for term of years, theretofore made of the said tithes, and other things, which the said *Parkinson* then had); to hold unto, and to the use of the said master, fellows, and scholars, and their successors for ever.

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The college covenant with sir *Walter* to present a fit and able clerk, and to permit and aid him in the enjoyment of the premises granted in trust for him. [1143]

Secondly, A deed-poll under the hand and seal of the said sir *Walter Mildmay*, dated 9th *April*, 31 *Eliz.* whereby, after reciting that he had by indenture, dated 26th *October*, 30 *Eliz.* settled the rectory of *Stanground*, with all the tithes and hereditaments thereunto belonging (except all such lands, tenements, tithes, advowson, and hereditaments in *Stanground* aforesaid and in *Farcet*, which he had granted to the master, fellows, and scholars of *Emanuel College*) to certain uses therein expressed, with power of revocation, the said sir *Walter* resumes to himself, and revokes, and declares void the said settlement, as concerning the tithes of wool, lamb, calf, corn, and grain, within the town or hamlet of *Farcet* and the fields and limits thereof, or any of them, and all sums of money, and other profits due or payable concerning the same, then or late parcel of the rectory of *Stanground* (other than the tithes of wool, lamb, calf, corn, grain, and other things arising from the demesne lands and tenements, of the manor of *Stanground*, and other lands and tenements of the said sir *Walter*, then or late in the tenure of *Henry Parkinson*, *Michael Beale*, *John White*, and *Thomas Smith*, or any of them, by lease or at will).

Thirdly, An indenture dated 11th *April*, 31 *Eliz.* between the said sir *Walter Mildmay* of the one part, and the said master, fellows, and scholars, of the other part, whereby, after reciting, that the said sir *Walter Mildmay* had erected the said college, and had also endowed the same with divers lands, tenements, tithes and hereditaments, and other things for the maintenance thereof, and yet having great care and zeal for the establishment and continuance thereof, to the glory and honour of Almighty God, and setting forth his holy gospel by good and able preachers, and for the increase of living of and for the vicar of *Stanground*, aforesaid, the said sir

1778. *Walter Mildmay*, for the considerations aforesaid, gave, granted, and confirmed unto the said master, fellows, and scholars,

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[1144] “ All those the tithes of wool, lamb, calf, corn, and grain within the parish, town, or hamlet of *Farcet* (except and reserving to the said sir *Walter* and his heirs, all and all manner of tithes of wool, lamb, calf, corn, grain, and other things arising from the demesne lands of the manor of *Stanground*, and all other lands and tenements then or late in the tenure of *Henry Parkinson*, *Michael Beale*, *John White*, and *Thomas Smith*, or any of them, by lease or at will, not being copyhold ; to hold to the said master, fellows, and scholars, and their successors for ever, upon trust, that they should perform the covenants therein after contained.

The college covenant, that they will at all times hereafter permit the vicar of *Stanground*, and his successors, to have, retain, and enjoy all and singular the premises in *Farcet* thereby granted without the interruption of the said college, and without any rent or service to them therefore to be yielded or done.

Evidence in support of the Respondent's case, under the third issue, viz. to prove the lands therein described to be situated within the hamlet of Farcet.

The manors of *Stanground* and *Farcet* both belonged to the abbot of *Thorney*, and upon the dissolution thereof, came to the crown ; *Robert Smith*, who held the offices of bailiff and collector of the rents of both manors under the abbot, was continued in those offices by the court of augmentation, in which court his accounts were passed annually upon oath, and recorded.

Fifthly, An office copy of the roll of the said *Robert Smith's* first account of *Farcet*, for one year, ending at *Michaelmas* 32 H. 8. wherein, under the title of *Farcet* collection, he accounts as follows, viz.

Under the title of “ Manor and demesnes of *Farcet* : ”

	£	s.	d.
For rents of assize of the free and customary tenants of the manor of <i>Farcet</i>	-	-	- 25 6 3
For the farm of a pasture called <i>Conquest</i> , lying within the limits of <i>Farcet</i> , extending from the <i>Fowle Lake</i> to <i>Farcet Water</i> , from <i>Conquest Land End</i> to <i>Horsey Bridge</i> , from <i>Horsey Bridge</i> to <i>Whittlesea Dyke</i> , and from thence to a place called <i>Raven's Willow</i> , let on lease to <i>William Cooper</i> , at	-	-	- 5 14 8

Under the title of “ *Agistamenta de Farcet.* ”

For thirty-three shillings and four-pence, for the issues

of a certain marsh called *Farcet Fen*, payable by different persons, for the agistment of their cattle, within the same marsh, for the space of one year - - 1 13 4

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Under the title of "Fees and outgoings," he craves the following allowances:

His fee as bailiff and collector, under the deed of appointment of the abbot - - - 1 13 4

For his fee as surveyor of the marshes or fens of *Stanground* and *Farcet* granted him by deed of appointment by the abbot - - - 3 6 8

[1145]

For stipend granted by the abbot, to *Charles Barlow*, clerk, for officiating in the chapel of *Farcet*, for his life - - - 4 13 4

There are two accounts for *Stanground*, for the same year, the one of the said *Robert Smith*, as bailiff of the manor and collector of the rents; the other of sir *Edmund Walsingham* knight, as farmer of the demesne and other lands, occupied by the abbot at the dissolution.

Sixthly, An office copy of *Smith's* account of *Stanground* manor for the same year; in which he accounts for the rents of assize, the rents of sundry farms in *Stanground*, in the occupation of himself and others, and the profits of the manor, but includes nothing arising from or belonging to *Farcet Fen*.

Seventhly, An office copy of the roll, containing the account of the said sir *Edmund Walsingham*, for the same year, as farmer of the demesnes rectory and other lands late in the hands of the abbot; wherein, under the head of "*Terræ dominicales de Stanground*," he accounts for the rents of the farm of the scite of the manor, and sundry parcels of arable, meadow, and pasture in *Stanground*, and amongst other particulars,

"For twenty shillings for the farm of a certain marsh called *Farcet Farm*, in which farm the cattle of the tenants and inhabitants of *Stanground*, *Walter Newton*, *Haddon*, and *Woodstone*, of ancient custom, depasture, the surplus of which marsh is to let to farm as above."

Eightly, An office copy of the roll, containing the said *Robert Smith's* account of the manor of *Farcet*, for the fourth year of *Edw. 6*.

In this account, under the head of "*Agistamenta de Farcet*," is contained as follows: "*De xxxiiis. iv d. de exit cujusdam marisci vocat: Farcette Fenne levabil: de divers persons pro agistament: catal: suor: infra eundem marisc: depascent: hoc anno debet hic non respondere eo quod dictus mariscus de Farcette fenne est parcell: ferme de Stanground dimiss: Edmundo Walsingham, milit. per indentur pro*

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ejusdem respons: est domino regi inde virtut. indentur: supra dict:
ut ibidem appareat.*"

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* Ninthly, A parchment roll found among the papers produced
*[1146] by the appellant, pursuant to the decree, appearing to be a parti-
cular of the scite of the manor, rectory, and other lands in *Stang-
ground*, for a lease thereof to be granted to sir *Edmund Walsingham*,
made out by the officers of the court of augmentation, and sub-
scribed by the judges thereof (of whom sir *Walter Mildmay* appears
to be one), and properly a record belonging to the augmentation
office.

This particular contains a description of the farm of the scite of
the manor of *Stangground*, and the other lands comprised in sir *Ed-
mund Walsingham's* first account, with separate rents annexed to
each article, amongst which it enumerates,

£ s. d.

" *Firma cujusdam marisc ibidem vocat. Farceid Fenne
in quo marisco catall. tenent. et inhabitant. de Stan-
ground, Waternewton, et Woodstone sans nombre
depast. surplusag. cujusquidam marisci spectat ad domi-
nam regem ratione sursum reddit. nuper monasterii
prædicti et valet communibus annis,* - - - 1 0 0

Tenthly, Another parchment roll, found amongst the papers
produced by the appellant, containing "A particular of the scite
and demesne lands of the manor of *Stangground*." It is subscribed
by *Christopher Smith*, clerk of the pipe, and appears to be a record
properly belonging to the pipe office; it is entitled, "Parcel of
the possessions of the late monastery of *Thorney*, late assigned to
our lady *Elizabeth*, now queen of *England*," and under the head
of the "scite and demesne lands of the manor of *Stangground*;"
it contains a particular description of the farm of the scite of the
manor, and the several parcels of lands belonging thereto. But
no mention is made therein of *Farceit Fen*, or any profit arising
therefrom; or a deduction of the twenty shillings (charged for it in
the preceding particular) made from the rent.

The premises described are mentioned "to have been demised
(among other things) to *Edmund Walsingham* knight, by letters
patent, dated 20th August 2 Edw. 6. for twenty-one years, and to
be then in the tenure of sir *Walter Mildmay*, at the rent of twelve
pounds eight shillings."

Examined by *Christopher Smith*, clerk of the pipe.

Eleventhly, An office copy of a record in the augmentation office,
containing the particular made out for the grant of the manor of
Farceit to sir *Walter Mildmay*, in fee, wherein,

Under the title of "manor of *Farcet*, in the county of *Huntingdon*," it describes the following articles :

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Rents of assize of the free and customary tenants	25	6	3	
A farm of one pasture, and fishery called <i>Conquest</i> , lying at <i>Farcet Bridge</i> , between <i>Raven's Willow</i> and <i>Pockets Holme</i> , with the fishery and pasture in <i>Conquest Close</i> , together with all willows growing upon or round the said pasture, from <i>Fowle Lake</i> to <i>Farcet Water</i> , together with the profits of fishing and fowling within the same limits, with the fishing in the water of <i>Farcet</i> , from <i>Conquest Land End</i> to <i>Horsey Bridge</i> , and <i>Whittlesea Dyke</i> , and from thence to a place called <i>Raven's Willow</i> , let on lease to <i>William Cooper</i> , at the rent of				
	5	14	8	
Profits of courts <i>communibus annis</i>	-	1	6	8

Under the head of reprisals, it states,

The fee of the bailiff <i>per annum</i>	-	1	13	4
Fee of the surveyor of the marches granted him for life	3	6	8	
Stipend of the chaplain officiating in the chapel of <i>Farcet</i>	4	13	4	

Twelfthly. Office copy of the grant from the crown of the manor of *Farcet* to sir *Walter Mildmay*, which bears date 30 June 7 Edw. 6. whereby the said manor of *Farcet*, and the farm described in the preceding particular, are granted to the said sir *Walter Mildmay* in fee.

Thirteenth. An office copy of a lease from the crown of the manor and rectory of *Stanground* to sir *Walter Mildmay*, bearing date 25 August 4 Eliz. from *Michaelmas* then next for sixty years, in which no mention is made of *Farcet* farm.

Fourteenth. An office copy of a decree of the duchy court of *Lancaster*; made in *Easter* term 7 Eliz. in a cause between the queen and sir *Walter Mildmay*, in consequence of a dispute which had arisen between sir *Walter* and the queen's fishers, in the water called *Whittlesea Meer*, (which was parcel of the duchy) relative to the boundary between *Farcet Fen* and the *Meer*.

This decree recites, that upon the certificate of the depositions taken before the commissioners, under a commission issuing out of the court for the inquiry of the true boundary and division "of a certain water of her majesty, called *Whittlesea Meer*, in the county of *Huntingdon*, from and between a pasture of sir *Walter Mildmay* knt. called *Farcet Fen* in the said county; as also, whether the said *Whittlesea Meer* had at any time consumed, wasted, surrounded, [1148] worn away, or won any part of the said pasture," it did plainly appear, that the ancient and true boundaries dividing and separating the said *Whittlesea Meer* from the said pasture were two, the one

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called *Ayrlmyndle's Hill*, and the other *Falce Tibbe*, within which boundaries the said water called *Whittlesea Meer*, had of late years consumed and worn away part of the said pasture; forasmuch therefore, as upon the deliberate hearing and perusing the said depositions and good advisement therein taken by her grace's chancellor and counsel of the said court, it appeared manifestly, that so much of the said water as was adjoining to the said pasture, and within the said boundaries, was the very right and inheritance of the said sir *Walter* as parcel of the said pasture.

It was therefore decreed and adjudged, that the said sir *Walter*, his heirs and assigns for ever, should and might lawfully have, hold and occupy, to his and their own proper use, so much of the said water, as was within and between the said two boundaries and the said pasture as parcel of the same pasture, with the fish and several fishing in the same water, at all times at his and their pleasure, without let, molestation, or intermeddling of any other person or persons.

Fifteenth. The respondent next read a passage from the appellant's second answer, wherein the appellant says, "that he has been informed, and believes, that at some time in or about 9 *Eliz.* an agreement was made, the said sir *Walter Mildmay* and some lords of the manors, who claimed a right of common in the said fen, and that by such agreement 400 acres of the said fen, adjoining to *Conquest Close*, were to be held in severalty by the said sir *Walter Mildmay*, his heirs and assigns, and believed the said 400 acres did, from the time of such agreement, become the separate estate of the said sir *Walter Mildmay*, his heirs and assigns.

Sixteenth. An office copy of the grant, dated 18th *March*, 30 *Eliz.* from the queen to sir *Walter Mildmay*, of the reversion in fee, of the manor, advowson, and rectory of *Stanground*, by the same description, as is contained in the said lease of 25th *August* 4 *Eliz.*

Seventeenth. A lease dated 16th *January* 1659, from *Oliver Saint John* to *John Bellamy*, of sundry parcels of the lands allotted out of *Farcet Fen* to the *Adventurers*, which are therein described to be situated in *Farcet*.

[1149] Eighteenth. An indenture dated 26th *May* 1691, from *Samuel Doughty*, vicar of *Stanground*, to *William Brownlow* esq. lord of the manor of *Stanground* and *Farcet*, and whereby the said *Samuel Doughty* demises to the said *William Brownlow*,

"All those tithes, of what nature or kind soever, due or belonging to him as vicar of the said church, in, out of, or for all that fen or fenny ground called or known by the name of *Farcet Fen*, containing in the whole, by estimation, 2240 acres, or thereabouts, part whereof having been anciently divided, was then called *Berkley's* lands, and contained by estimation 940 acres, or thereabouts, and

the other part thereof, then lately inclosed or divided, containing by estimation 1300 acres, which fen is situated and being in *Stanground* aforesaid, and *Farcet*, or one of them :

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“ To hold from *Lady-day* then last, for five years, if the said *Samuel Doughty* should so long live, at the yearly rent of fifty pounds, payable quarterly.”

Nineteenth. An indenture of lease, dated 26th *May* 1751, between *William Whitehead* clerk (vicar of *Stanground* aforesaid) of the one part, and the right honourable sir *John Brownlow*, lord viscount *Tyrconnel*, lord of the said manor, and impropriate rector of the said parish, of the other part; whereby, after reciting sir *Walter Mildmay's* grant of the tithes of corn, grain, wool, lamb, and calf, in *Farcet*, and taking notice, that within the parish of *Stanground*, was a great farm, commonly called *Farcet Farm*, containing by estimation 2240 acres, viz. 940 acres, part thereof, called *Berkley's* or the *Adventurer's Lands*, which had been long before the year 1683, inclosed and divided, and the remaining 1300 acres belonging to the said manors or one of them, but which had been used time out of mind, until about the said year 1683, as a common of pasture, for the inhabitants of *Stanground* and *Farcet* aforesaid, in which also, the farmers and land-holders of the several towns of *Woodstone*, *Fletton*, *Haddon*, *Stibbington cum Sipson*, and *Water Newton*, in the said county of *Huntingdon*, claimed and enjoyed a right of common for the working of cattle levant and couchant, upon their respective tenements; and reciting, that part of the said farm lay within the hamlet of *Farcet*, and that in or about the said year 1683, the said 1300 acres, or thereabouts, of the said farm, then lying in common as aforesaid, were by virtue of the statute made 15 *Car. 2. c. 17.* intituled, “ An act for settling the drainage of the great level of the fens, called *Bedford Level*,” divided into many parts, and allotted severally and respectively to the several persons having right of common therein. And reciting, that after such division, divers disputes arose, and suits were commenced and prosecuted between *William Brownlow*, esq. father of the said lord viscount *Tyrconnel*, (in whom by mesne conveyances the said manor and rectory were vested), and several of the vicars of *Stanground*, which suits and controversies were at length compromised by agreement, to grant to the said *William Brownlow* by *Joshua Ratcliffe* B. D. then vicar of *Stanground* aforesaid, a lease of all the tithes in the said fen, belonging to the said vicarage, by means of the said endowments, or otherwise howsoever, and by the said *William Brownlow* accepting thereof, in such manner as the same is thereafter granted and set forth. And reciting, that a lease was thereupon granted by the said *Joshua Ratcliffe* to the said *William Brownlow*, by indenture bearing date 30th *May* 1683, and after the death of

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the said *Joshua Ratcliffe*, another lease bearing date 26th May 1691, to the very same purpose and effect, as in the said former lease was made, from *Samuel Doughty* clerk, then vicar of *Stanground* aforesaid, to the said *William Brownlow*, for five years, if the said *Samuel Doughty* should so long live, and continue vicar of *Stanground*. And reciting, that the said composition and agreement was found so advantageous, both to the rector and vicar aforesaid, that although no lease in writing was executed between the parties since the expiration of the said last mentioned lease, yet the said agreement and composition had been duly observed by and between the succeeding rectors and vicars ever since, and the said rectors had duly paid the said reserved rent, and enjoyed and continued in the possession of the said tithes ever since, and still continued to do the same. And reciting, that it had been advised and found expedient, that the said lease should be renewed by the said *William Whitehead* the then vicar, to the said lord viscount *Tyrconnel*, the then rector, in manner aforementioned; it is witnessed, that the said *William Whitehead*, in confirmation of the said composition and agreement, and for and in consideration of the rent and covenants thereafter reserved, &c. and for other good causes, &c. granted, leased, and demised unto the said lord viscount *Tyrconnel*,

All those his tithes and tenths of what nature or kind soever, due or belonging to him the said *William Whitehead*, as vicar of the vicarage of *Stanground* aforesaid, in, out of, or for all that the said fen or fenny ground, called or known by the name of *Farcet Fen*, containing in the whole, by estimation, 2240 acres, or thereabouts (be the same more or less), part whereof having been anciently divided, was lately called or known by the name of *Barclay's Lands*, otherwise *Adventurer's Lands*, and containeth, by estimation, 940
[1151] acres, or thereabouts, and was then in the tenure or occupation of the right honourable the earl of *Lincoln*, or his under-tenants, and the other part thereof, first inclosed or divided about the year 1683, as aforesaid, containing by estimation 1300 acres, or thereabouts, as aforesaid; which said fen or fenny ground is situated and being in the parish of *Stanground*, and lies partly in the hamlet of *Farcet*, in the said county:

To hold the said tithes, tenths, and premises, to the said *John* lord viscount *Tyrconnel*, his executors, administrators, and assigns, from *Lady-day* then last, for the term of fifteen years, if the said *William Whitehead* should so long live, and continue vicar of *Stanground*, at the yearly rent of fifty pounds.

Copies of court-rolls of the manor of Farcet, found in the parish chest of Stanground.

Twentieth.. Sir *Walter Mildmay*, lord. Admission of *Richard*

Olde, dated 13th September, 5 & 6. Ph. & Mar. to one college, and two acres of land, with the appurtenances in *Farcet*; and one eight rood in *King's Delfe*, late in the tenure of *Thomas Astelyn*, on the surrender of *William Olde* his father. 1778.

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Twenty-first. Sir *William Mildmay*, lord. Copy of licence, dated 16th October 30. Eliz. to *Thomas Andrew*, to let *William Pedley* his customary tenements in *Farcet*, viz. one messuage and one yard half land, with the appurtenances, two doles of meadow in *King's Delfe*, and half an acre of meadow in *Milby*, one barn called the *Forswath*, and seven lots of meadow lying in *South Meadow*, for the term of six years.

Twenty-second. Earl of *Westmoreland*, lord. Admission dated 18th September, 11 Jac. 1. of *Charles* and *Joseph Andrew*, to one quarter of arable land, one hog-yard and barn, the moiety of one close, one dole, and the third part of *Eight Rood*, in *King's Delfe*, three lots and half in *South Meadow*, the third part of two holts in *South Meadow*, the third part of two holts in *Bell Hive*.

Twenty-third. Dowager lady *Westmoreland*, lady. Admission dated 27th September, 12 Car. 1. of *Robert* and *Charles Elmer*, to one messuage, and one eight rood in *King's Delfe*.

Rates and Assessments.

Twenty-fourth. The churchwarden's assessment of *Farcet* for the year 1681, whereby it appears, that *New Meadow*, *South Meadow*, *Milby*, the tithe of *King's Delfe*, and *Milby*, the *Eight Roods*, the lord *Berkley's* or *Adventurer's Lands*, and *Beale's Cotes*, were then rated to *Farcet*.

Twenty-five. Land-tax duplicate for *Farcet*, for the year 1692, [1152] 11 Wil. & Mary, wherein *William Brownlow* esq. is rated to *Farcet* for his tithes of the *King's Lands*, *King's Delfe*, *Milby*, and the late inclosed fen.

Twenty-six, seven, and eight. The like for the years 1728, 1729, and 1730, wherein the vicar is rated for the tithes of the field and composition money, and for *Conquest Lands*, *King's Lands*, and the great fen, small tithes, and glebe land.

Twenty-nine. The like for 1739, wherein the tithes of *King's Delfe*, &c. are expressed.

Thirty-one, two. The like for 1749, 1750, 1753, wherein *Beale's Cote* is rated by name.

Thirty-three, four, five. Land-tax duplicates for *Stanground*, for the years 1692 and 1730, wherein part of the fen appears to be rated.

Parole Evidence.

The respondent lastly proved, by the testimony of living witnesses, the boundaries of *Farcet Fen* as hereinbefore described,

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and that *King's Delfe, Conquest Lands, Milby, New Meadow Beale's Cote*, and the *Pingles*, lay within, and were considered as parcel of it.

That *Farcet* had separate parish and civil officers, viz. churchwardens, overseers, constable, and surveyor of the highways; that it maintains its own poor, and is separately rated to the land-tax.

Thirdly, That the inhabitants of *Conquest Land* serve all parochial and civil offices for *Farcet* and not for *Stanground*.

Fourthly, That *Conquest Land, King's Delfe, Milby, New Mead, Beale's Cote*, and the *Pingles*, and the fishery in *Whittlesea Meer*, are rated to *Farcet*.

Fifthly, That the drove-ways throughout the fen are under the care of the *Farcet* surveyor, and are repaired by the inhabitants of *Farcet* only, and that the inhabitants of ancient messuages in *Farcet* enjoy the exclusive privilege of keeping their hogs in the drove-ways.

Sixthly, That *Oakey Dyke*, the north-east boundary, (upon which *King's Delfe* adjoins), so far as it divides *Farcet's King's Delfe* from *Whittlesea King's Delfe*, is scoured as follows, viz. about half way by the owners in *Whittlesea*, and the remainder by the owners of ancient messuages, which formerly had rights of common in the open farm, and that no part of the dyke is scoured by the owners of *King's Delfe* which lies next it.

[1153] *State of the evidence produced by the appellant on the trial.*

The defence set up at the trial by the appellant, exclusive of the objections taken to the legal validity of the grants, and to the evidence produced by the respondent, was, that the question in issue had been already repeatedly tried, and conclusively determined against the vicar, who ought not therefore to be permitted to revive claims against the tenor of their decisions; and he produced in evidence,

The record of a judgement in the court of Common Pleas, as of *Hilary* term 21 & 22 *Car. 2.* in an action brought by *Charles* earl of *Westmoreland*, as impropriate rector of *Stanground*, against *John Mawley*, for fifteen pounds, for treble value of the tithes of grain, oats, and maslyn, of twenty-seven acres of land in his occupation; which lands in the declaration are described to be situated within the parish of *Stanground*, and the boundaries, limits, and tithable places thereof; the verdict was found for eight pounds two shillings for the plaintiff, and for the residue of the fifteen pounds for the defendant.

The appellant's counsel alleged, that the lands, for the tithes whereof this action was brought, were parcel of the *Adventurer's Lands* (then called the *King's Lands*), and that the action was in

fact defended by the vicar; but nothing appearing upon the record to warrant that assertion, he attempted to prove it in the following manner :

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On *December 2, 1684*, *Montague Cholmley esq.* and *William Brownlow esq.*, an infant, the then impropiator of the said rectory, (by the said *Montague Cholmley* as his next friend and guardian) exhibited their bill in Chancery against the master, fellows, and scholars of *Emanuel College*, and *Dr. James Wolfenden*, then vicar of *Stanground*, charging the defendants with intent to stretch the grants of *sir Walter Mildmay* beyond their true intent, and with setting up a claim to tithes arising from sundry of the excepted lands, and the tithes of corn in certain lands situated in *Stanground* and out of the hamlet of *Farcet*; that the boundaries and identity of the demesne and excepted lands would be lost, unless the plaintiffs were permitted to record and perpetuate their evidence thereof; and that the defendants threatened to commence actions at law against the plaintiff's tenants for the recovery of tithes never before claimed by, or known to be due to the vicar; and therefore praying, that the defendants might answer the bill, and that the plaintiff's proof of the matters aforesaid might be taken and perpetuated.

To this bill the defendants appeared, whereupon the plaintiffs [1154] immediately obtained an order and a commission to examine their ancient witnesses *de bene esse*, which was executed *ex parte* (the defendant not joining therein), and the depositions of a great number of witnesses were taken; but before it was returned, and before any answers were put in to the bill, *Dr. Wolfenden* died, and the college having shortly afterwards presented *John Ratcliffe* to the said vicarage on *November 4, 1685*, the said plaintiffs filed a bill of revivor and supplement against him, stating the former proceedings, and praying that the plaintiffs might have the benefit of the testimony of such of the witnesses, examined in the lifetime of *Dr. Wolfenden*, as should not live to be again examined in ordinary course, and that the defendants might discover the particulars of the tithes they claimed.

The defendant *Ratcliffe* afterwards put in his answer, stating the grants and his claims under them, and that he hoped to prove that divers large fenny or marsh grounds lay within the hamlet of *Farcet*; and admitting that he brought several actions in the name of the master, fellows, and scholars of *Emanuel College*, against *William Bellamy*, *Edward Dawkins*, *John Mason*, and *John Brookes*, which he conceived justly to belong to him.

The plaintiffs never examined their witnesses in chief, or proceeded further in the cause, although both *Mr. Brownlow* and the vicars lived many years afterwards.

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The appellant produced and relied on the depositions thus taken, as evidence for him on the present trial; and in order to prove that the record of the judgement above-mentioned respected the tithes of parcel of the *King's or Adventurer's Lands*, he read from the depositions the following passages, viz. the depositions of *Robert Coveney*, to the eleventh interrogatory, folio 34, who says, "That about fourteen years before the time of his examination, to the best of his remembrance, there was a trial at common law between *Charles earl of Westmoreland* plaintiff, and one *Morley* and others, tenants to the *King's Lands*, defendants; at which trial the earl obtained a verdict for the tithes of the said lands, the deponent being present thereat, and that the earl was, at the time of the trial, lord and owner of the manor of *Stanground*; and says, he has heard and believes, that there was a private composition made between the late lord *Berkley* (or his agents) then lessee of the said lands, and *William Forbes*, then vicar of *Stanground* aforesaid, concerning the payment of these tithes."

[1155] Deposition of *William Bellamy* to the same interrogatories, folio 159. says, "He remembers an action at law brought by the earl of *Westmoreland*, against one *John Morley*, and *Edward Dawkins*, for their non-payment of all their tithes growing and renewing upon parcels of the lands called *King's Lands*, to which they were then tenants; and that the same was tried at *Huntingdon* assizes, when a verdict was had against *Morley* and *Dawkins* for the earl; and that one *Mr. Maurice Cole*, on the behalf of those defendants (then agent to the said lord *Berkley*), paid the treble damages given by the said verdict to the use of the earl; which action was tried, to the best of the witness's remembrance, about seven years since."

The appellant next produced the record of an issue, as of *Hilary* term 34 & 35 *Car. 2.* in an action in the court of Common Pleas brought by the master, fellows, and scholars of *Emanuel College* against *Edward Bellamy*, for thirty-six pounds, the treble value of the tithes of corn, oats, and hay, of twenty-six acres of land, and thirty acres of pasture, in the vill of *Farcet*, in his own occupation, the declaration stating the plaintiff to be impropriator of the tithes of grain and hay arising out of the said lands.

The roll contained no entry of any judgement; but the appellant's counsel alleged, that the plaintiffs were nonsuited; and, as evidence of a judgement of nonsuit, produced the copy of an entry of the name of the cause in the prothonotary's book, intituled, *specialia judicia*; but the entry does not express what the judgement was, nor whether for the plaintiffs or defendant, or indeed whether there was any judgement at all.

In further proof of the nonsuit, he read, from the depositions before-mentioned, the evidence of *William Bellamy* to the twelfth interrogatory, folio 165. who says, "That about two or three years past, there was an action at common law commenced by the vicar of *Stanground*, in the names of the master, fellows, and scholars of *Emanuel College*, against *Edward Bellamy* gentleman, for his non-payment of his tithes of *New Meadow*, and the tithe-oats of *King's Delf*;" which action being tried at *Huntingdon*, the said plaintiffs were nonsuited upon good evidence.

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The next evidence produced by the appellant, was the record of a judgement of nonsuit in the Court of Common Pleas in *Hilary* term 1 & 2 *Jac.* 2. in an action brought by the said master, fellows, and scholars of *Emanuel College*, against *William Bellamy* of *Farcet*, for eighteen pounds, the treble value of the tithes of oats of twenty acres of land in the vill of *Farcet*, in the defendant's [1156] occupation.

The remainder of the evidence produced by the appellant, consisted of the depositions of the other witnesses taken under the said commission, which went to the several points following :

First, To prove that the tithes of grain and hay in the meadows of *King's Delfe* and *Milby*, for many years past, and the tithe of corn of the *Adventurer's Lands*, since the drainage had been usually paid to the impropriator ; and that the tithe of cole-seed, hemp and flax, and all other small tithes, had been paid to the vicar, and that *New Meadow* paid no tithe ; but that an acre thereof had been many years set out to the impropriator in lieu of tithe.

Secondly, To prove sundry perambulations of the parish of *Stanground*, in which it appeared, that when the inhabitants of *Stanground* arrived at *Farcet Fen*, the inhabitants of *Farcet* joined them, and they proceeded together round the whole of the boundary of the fen, described in the map annexed, and that disputes happened when the *Farcet* people attempted to perambulate the same alone.

Thirdly, That the courts-leet of *Stanground* had occasionally taken cognizance of the offence committed by commoners in *Farcet Fen* before the inclosure thereof.

Fourthly, That before the drainage of the said fens, several drifts of the cattle of the commoners therein had been made by the assistance of the inhabitants of *Stanground* and *Farcet*, to the burystad-yard of *Stanground*, where they were detained till the owners paid their acknowledged pence to the lord ; and from this circumstance the witnesses say, they believe the soil of the fen belonged to the lord of the manor of *Stanground* as parcel of that manor.

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Evidence produced by the Respondent in reply.

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The judge having over-ruled the objection taken by the respondent's counsel to the admissibility of the above depositions as evidence, and having permitted the appellant to read them, the respondent read out of them such passages as tended to corroborate his own title, by proving the payment of tithes to the vicar.

Objections urged by Appellant, in support of his motion for a new trial.

To the verdict found upon the several issues in favour of the respondent it was objected generally,

[1157] First, That the evidence offered on the part of the respondent, and admitted by the judge upon the trial, was, in many respects, inadmissible in law, and ought not to have been received.

Secondly, That the conclusion drawn by the jury is not warranted by the evidence.

To the evidence produced in support of the vicar's claim to the several species of tithes under the first issue, it was objected, that the original endowment itself ought to have been produced, and that the copy of it alone was not sufficient, and ought not to have been received.

Answer. — It is not very easy to understand what is meant by this objection, but it is supposed to be this, that the instrument of endowment under the seal of the abbot and convent ought to have been produced; if this be the meaning, the answer is,

That such instruments of endowment are at this time very rarely to be found; that for the sake of preserving such endowments, it has always been usual to enter them in the registry of the bishop of the diocese, and that such entries in the bishop's registers have always been considered as originals, and received as such in evidence, without objection, in all courts of justice. If the two entries produced in the present case from the two registers of the bishop of the diocese were neither of them to be considered as originals, yet, as not any original is known to exist, they ought to be received as copies, deriving their authenticity from the places in which they are found.

Objection. — It is further objected, that the exceptions of the several species of tithes in the first issues ought to have been extended to the tithe of wool, as included under the word *garba*, and to the tithe of agistment, as included under the word *blodum*, and that in that respect the finding is wrong.

But the respondent humbly insists, that the sense in which the jury have understood those words is the usual and common import of them: that *garba* properly means a sheaf or bundle of corn, and

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is applicable to corn only; *bladum* all kinds of grain in the blade, and that such is the sense in which they have been taken by old writers upon these subjects. And it is observable, that in the indorsement upon the copy of the endowment found in the registry at *Bugden* (by which the vicar is further endowed with the third of the tithe-corn in *Farcet*) the word *garba* is used, which can only be applicable to sheaves of corn. In confirmation of these endowments, and of this plain sense and import of the words, evidence was given of the vicar's having always received the small tithes in general throughout the parish, without any exception of wool or agistment.

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To the finding upon the second issue it is objected,

First, That the grants of sir *Walter Mildmay* are void in law, as being within the statutes of mortmain.

Secondly, That the finding of the jury is not warranted by the words and meaning of the grants.

Thirdly, That there ought to have been an exception for such part of *Stanground* as lies in the county of *Cambridge*, the grant mentioning the county of *Huntingdon* only.

Fourthly, That it does not appear from the evidence, what the *Berystead* farm is.

Answers.—The respondent submits that he might safely rely upon the evidence of the receipt of all small tithes throughout the parish by former vicars, his predecessors, in answer to these objections; from which it appears, that the immemorial usage in the parish has been so.

First, The objection that sir *Walter Mildmay's* grants are void in law seems to come with very little propriety from the present appellant with a view to defeat the act of his predecessor, under which all subsequent impropiators for a space of now near two hundred years have uniformly acquiesced. But it is insisted, that these grants are not within the statutes of mortmain, nor is the subject of these grants, *viz.* tithes, one of the objects of those acts, as will appear from the words of those acts, in which lands, and lands only, are particularly mentioned.

Tithes, in their original institution, were designed for the support of the officiating clergy, in their respective parishes; and although they were frequently annexed to religious houses, yet some provision was always made for the person who actually performed the duty. It was incumbent upon the religious house to make a reasonable provision for the vicar. That duty devolved in the present instance upon sir *Walter Mildmay* after the abbey was dissolved; and it seems very hard to contend, that because sir *Walter* has given back a part of that, the whole of which was once designed for the officiating parson, that gift shall be void. But the respondent sub-

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mits, that if it be held that in such an instance as the present, a licence to alienate in mortmain be necessary, it is not incumbent upon him to produce such a licence, but that after the length of time *which has elapsed since the date of the grant (1588) it will be presumed, that there was a licence then, and that it is now lost.

Secondly, The respondent submits, that his right to the tithe of wool, lamb, and calf, is clearly established by the first grant of sir *Walter Mildmay*, by which those tithes are absolutely given to the vicar and his successors, and that the verdict of the jury is warranted by that evidence alone, without having recourse to the second grant.

Thirdly, The words "in the county of *Huntingdon*," are only descriptive of the general local situation of the parish of *Stanground* with *Farcet*, by much the greater part of which lies in that county, and a very small part of it in *Cambridgeshire*, and it is submitted, from the recital of the grant and the wording of it, that it never could be the meaning of sir *Walter Mildmay* to give less than all the tithe of wool, lamb, and calf (with the exception of the demesnes) throughout the parish; to which may be added, that in the grants to sir *Walter Mildmay* of the manor and rectory the county of *Huntingdon* alone is mentioned.

Fourthly, The exception of the *Berrystead* farm is a well-known description of the manor farm, undoubtedly containing what was originally called the demesne of *Stanground*, and the old witnesses speak of it by the name of the *Berrystead* farm, as being so called in the last century.

To the fourth, fifth, and sixth issues it is objected, that the evidence does not warrant the conclusion of the jury; but that as to so much of the tithe of corn and grain as depends upon the second grant of sir *Walter Mildmay*, by which one half of the tithe-corn in *Farcet* is given, it ought to have been found with an exception of the demesnes and other lands, and also, that the vicar's right does not extend over any lands, but such as produced corn at the time of the grant, and were then called the fields of *Farcet*.

The fifth and sixth issues being subdivisions of the fourth, the respondent humbly insists, that if the evidence be found to be sufficient to support those issues, it will follow of course that the finding of the fourth in his favour is right.

The indorsement upon the old endowment found in the registry of *Bugden* (by which it appears that 22 H. 6. 1444, the then abbot of *Thorney* increased the vicar's portion by adding to it one-third of the tithe-corn in *Farcet*) would, it is submitted, be alone sufficient evidence to warrant the verdict of the jury upon the fifth issue. But this is corroborated and solemnly acknowledged at the distance of near one hundred and fifty years by the then improper

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ator sir *Walter Mildmay*, who in his deed of 24th October 1587, recites it as a known fact, "that the vicar and his predecessors had but only one-third part of the tithe-corn of *Farcet*," without excepting any part of that hamlet.

By the grant from the abbey of *Thorney*, which gives "*tertiam garbam decimis granorum in campis de Farshed*," it is submitted, that not only the tithe of such land as at that time produced corn is granted, but all corn-tithe whatever, which at any future time should arise from any newly cultivated land within the hamlet, and that such is the obvious sense of the words of the endowment; and the legal inference from them. This too plainly appears to have been the opinion of sir *Walter Mildmay*, who, in the addition which he makes to the vicar's tithe-corn, expressly mentions "that he would then have a full moiety of all the tithe-corn renewing in the town, fields, and hamlet of *Farcet*." A description as general of the whole extent of *Farcet* as words can convey, and that too without any exception of any lands whatever; for the exception of the demesnes of *Stanground* in that grant relates to the tithes of wool, lamb, and calf only.

Upon the sixth issue, by which the vicar claims two-thirds of the tithe-corn in *Farcet*, it is submitted that the evidence supports the verdict: one-sixth part is given by the first grant in general terms "throughout the towns, fields, or hamlet of *Farcet*:" to this grant there is not any exception; but in the second grant there is an exception, to which the jury ought, as the appellant contends, to have paid some regard; and not having done so, the verdict is, in that respect, against evidence.

Upon a careful and attentive perusal of the two grants, with the deed poll of 9th April 1588, it will appear that the deed poll is very incorrectly worded, and has certainly given rise to the errors which are manifest in the second grant.

By the first grant sir *Walter Mildmay* had disposed of all his tithes of wool, lamb, and calf, throughout the parish, except only the demesnes of *Stanground*. The object of the deed poll is to resume to himself certain tithes which he had by a prior deed, bearing date only two days after the first grant, settled to certain uses, with a power of revocation. By that deed poll he resumes all the tithes of wool, lamb, calf, corn, and grain, which at any time thereafter should be coming, arising, &c. within the town or hamlet of *Farcet*; but sir *Walter* had no tithes of wool, lamb, and calf, in *Farcet* at that time; in this, therefore, the deed poll is incorrect. The second grant is copied from the deed poll, and professes to convey more than sir *Walter* had to grant, viz. the tithes of wool, lamb, and calf; but it can hardly be contended, that because it describes more than sir *Walter* had, it shall not even pass that, which

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it is obvious he meant, and was about to convey, namely "all those his tithes of corn and grain, within the parish, town, or hamlet of *Farcet*;" and as sir *Walter* knew, that the vicar had at that time one clear moiety of the tithe-corn there, without any exception, and had himself contributed a part of but six months before, it is impossible to conceive, that he could design to add the other moiety to it, subject to any exception whatever. In fact, the exception can only apply to the tithes of wool, lamb, and calf, by relation to the first grant, in which that exception is found, and from which it has inadvertently been copied into the deed poll, and the second grant.

Upon the third issue, by which the several parcels of land mentioned in it are found by the jury to lie within the vill, town, or hamlet of *Farcet*, it is submitted, that there is evidence to prove, that all those parcels are included within the known boundary of the large tract of marsh ground commonly called *Farcet Fen*.

The manors of *Stanground* and *Farcet* were distinct from each other, and appear to have been so by the separate accounts which were kept of each. The rights exercised by the lord of the manor of *Farcet* over the marsh called *Farcet Fen*, clearly prove, that in old time it was considered by all persons concerned, as lying within the limits of that manor.

Smith accounts for the agistment of the fen, *Mich.* 31 to 32 *H.* 8., as parcel of the manor of *Farcet*.

Sir *Walter Mildmay*, 25th August 1591, obtains a lease of the manor and rectory of *Stanground* from queen *Elizabeth* for sixty years.

The manor of *Farcet*, 7 *Edw.* 6. A. D. 1553, is granted to sir *Walter Mildmay* in fee.

By the decree of the duchy of *Lancaster*, 7 *Elix.* A. D. 1564, the fen is said to be the very right and inheritance of sir *Walter*.

By agreement, 10 *Elix.* A. D. 1567, between sir *Walter* and the commoners, 400 acres of *Farcet Fen*, adjacent to his close, called *Conquest Close*, were allotted to him, "which should be held by him, and his heirs, in severalty for ever." From which two instruments it appears, that the decree and agreement related to the manor of *Farcet* alone, of which sir *Walter* was at that time seised [1162] in fee. He had at that time only a lease for years of the manor of *Stanground*, under which the fen could never, with legal propriety, be called the very right and inheritance of sir *Walter*; still less could he, as lessee for years, accept from the commoners the 400 acres adjoining to *Conquest Close*, to hold to him and his heirs in severalty for ever; or, in compensation thereof, have taken upon him to execute to them a release of the right of himself and his heirs to the herbage of the residue of the fen.

It is manifest therefore, that he was considered as the lord of *Farcet* manor only; and in fact, those 400 acres have been enjoyed by the lords of *Farcet* manor in severalty for ever since, and are actually now in the hands of lord *Brownlow*, the present appellant.

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From this evidence which applies thus pointedly to the whole of *Farcet Fen*, the conclusion seems obviously to follow, that no part of the fen can be, or ever was considered as parcel of the demesne of the manor of *Stanground*; and although it is not contended on the part of the respondent, that in all cases the boundaries of a vill, town, or hamlet, are co-extensive with the boundaries of a manor of the same name, yet it is insisted that such evidence was proper to be laid before a jury, and carries with it a degree of probability, at least, where positive evidence of the actual boundary of the hamlet in question cannot, at the distance of 200 years, be procured; especially when the fen has, though equally near to the hamlet of *Stanground*, been ever distinguished by the name of *Farcet Fen*, and the river which lies between *Packet's Holme* and *Horsey Bridge*, and which divides *Farcet Field* and *Stanground Field* from the fen, is likewise known by the name of *Farcet Water*.

From the usage of later times it appears, that the land-tax assessments have rated the fen as lying within *Farcet*; that *Farcet* has its constable, surveyor of highways, overseers of the poor, and church or chapelwardens.

That the occupiers of *Conquest Lands* serve parochial and civil offices for *Farcet* only.

That *King's Delfe*, *Milby*, *New Meadow*, the *Pingles*, the fishery of part of *Whittlesea Meer*, are rated to the poor's rate in *Farcet*, except a few doles in *King's Delfe* to *Stanground*, which was the ground of the exception which the jury have made as to the local situation of part of *King's Delfe*.

The local situation of the several pieces of ground mentioned in the third issue, being by the verdict of the jury ascertained to be within the hamlet of *Farcet*, the vicar's right to tithe, in pursuance [1163] of his endowments, necessarily attaches upon them; a right which, when the land was drained in the last century, was claimed by the then vicar against the impropriator; and which, though disputed as to its extent, was never absolutely denied, till the present appellant was advised to dispute, and actually does dispute, any right which the vicar may have to any tithe at all; and this against the evidence of the grants of his predecessor sir *Walter Mildmay*, from whom his impropriation is derived; against the uninterrupted enjoyment of tithes of some kind throughout the parish; against the composition of twenty-five pounds a year, constantly paid from the year 1640 to the year 1773; and lastly, against the leases of 1691

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and 1751 from the then vicar to the then impropriator of all his tithes of what nature or kind soever in *Farcet Fen*, at the yearly rent of fifty pounds.

On the part of the appellant were produced,

First, Old records.

Secondly, Depositions in a cause 1684.

The first record merely shews, that the earl of *Westmoreland*, as impropriator of the rectory of *Stanground*, obtained judgement in an action for tithes of grain and oats for lands within the parish of *Stanground*. This certainly proves nothing against the vicar, for it never was denied, but that the impropriator had a right to the tithe of grain in all parts of the parish, not in the hamlet of *Farcet*.

The second record contains a declaration and plea merely, and nothing else.

The third is a judgement of nonsuit, in a cause of *Emanuel College* against *William Bellamy*, but upon what ground the nonsuit was obtained does not appear.

If such evidence as this deserved an answer, the subsequent leases accepted by the impropriator from the vicar, which are stated to have been granted in consequence of a compromise, would be decisive proof, that there had been no decision in those actions against the right of the vicar. But as in one record the proceedings went no farther than the plea, and it is well known that a nonsuit by no means precludes a party from prosecuting a further claim, these records seem to have no force at all.

[1164] The depositions in the old cause appear to have been *ex parte* examinations merely; the witnesses never were examined in chief, nor was there any cross examination on the part of the vicar; the depositions were never published; such evidence, if admissible, is certainly, on the impropriator's part, entitled to very little credit, and can never be supposed to weigh, in the opinion of a jury, against old records, long usage, and the variety of circumstantial evidence produced on the respondent's part.

What relates to the supposed jurisdiction of *Stanground* manor over *Farcet Fen* is certainly entitled to no credit at all; the appellant is lord of the manor of *Stanground*; the rolls and proceedings of the courts of that manor are in his hands, and are the only proper evidence of the rights which have been exercised by the lord at different times; no such evidence was produced at the trial, or offered; but, as it is obvious, that such evidence must have been material had any such existed, the respondent submits, that he has a right to conclude, either that no such jurisdiction of the manor of *Stanground* can be proved to exist, or that, if the rolls had been produced, they would have proved the direct contrary.

1778.

Devie
v.
Lord
Brownlow.

From the accounts given of the perambulations, nothing certain can be concluded, but that the inhabitants of such township were jealous of the encroachments of the other, and kept a watchful eye over every attempt that might be made by the one to abridge the rights of the other.

The vicar's right to tithes in the fen is certainly not abridged or affected by any evidence tending to shew that the impropriator has occasionally received tithes there, because it was a matter of perpetual controversy between the impropriators and the vicars during many years; compositions of twenty-five and thirty-two pounds existed during the time; which compositions particularly related to *King's Lands* in the fen; so that any receipt of tithes from off those lands by the impropriator, as long as that composition existed, was in fact the receipt of the vicar by the hands of another.

Upon the whole, it is submitted on the part of the respondent, that the order which has been made by the Lord Chancellor for refusing a new trial, ought to be affirmed for the following (amongst other) reasons:

First, That there is not the least ground to impute to the learned judge, who tried the cause, any misdirection to the jury, nor the admission of any improper evidence in favour of the respondent, nor the rejection of any legal evidence on the part of the appellant.

Secondly, That the far greater and more material part of the evidence is in writing; of the import and effect of which, the Lord Chancellor was, and their Lordships are competent judges; and upon which there is no reason to suppose, that any further light [1165] could be thrown by another reference to a jury.

Thirdly, That the parole testimony given was almost wholly in favour of the respondent, and the cause was tried with every possible advantage to the parties and to justice, a full special jury of gentlemen having attended the trial, (which employed two whole days,) many of whom had taken a view of the lands out of which the tithes in question arise.

July 2. A. D. 1782. Ordered and adjudged, that the appeal be dismissed, and the order complained of affirmed.

H. 19 Geo. III. A. D. 1779. Scac.

Williams v. Williams, & e contra. [MS.]

LORD C. B. — This is a bill by the vicar of *St. Kevern* in *Cornwall* for almost all small tithes. The defence admits an endowment of all the tithes in question, but insists upon customary payments for all the ancient farms, and also for certain dues and

S. C.
4 Wood's
Decr. 76.
Where an
early terrier
is not

1779.

Williams

v.

Williams

clearly expressed and affected by a later, the court cannot make a decree upon them, but will direct an issue.

offerings. The parishioners have filed a cross bill to establish these customary payments. On the part of the defendant, the proof arises from two written instruments; one, an ancient parish-book kept in the parish-church among the parish-papers, entitled "St. Kevern parish, 1683. An account of the tithes then due, &c. according to the ancient custom of the parish;" and concluding, "We the minister and twelve of the parish do find the custom above, &c. to be the ancient custom, &c." signed by them all. The next, a terrier dated 1727 brought from the Bishop's Registry, in which are words to this effect, "said to be a pretended custom as follows," then it transcribes the former. None of these tithes, as far as appears, have ever been paid in kind. But the payments for marriages, &c. have been various and frequently different from those stated in the two instruments. In 1683 therefore there appears a formal acknowledgement of the vicar of the existence of certain customs. Whether the tithes in kind were paid before or after the terrier does not appear; but probably not, because of the phrase "pretended," whence it seems at that time to be asserted on one side, but not admitted on the other. However, it does not appear that the vicar ever took tithes in kind. The compositions themselves afford no certain evidence whether paid for the tithes in kind, or for the customary payments. There is therefore such a ground as deserves further inquiry. The terrier is said to be imperfect, because all tithes are not included in it; but it does not appear, that the parish has yielded those species which are omitted. And it is observable, that there is no proof of tithe in kind having been paid for any other species than those mentioned in the papers. As to the dues, it has been insisted, that there is a difference; yet if those payments appear to be part so, part not, they may be separated by a jury.

[1166]

The mode of inquiry is next to be considered: for it is said truly, that the exemptions alleged are of particular farms, those proved are general. There being no prayer suited to the proof in the cross bill, that must be dismissed; for the court cannot decree what is not prayed. As to the vicar's bill; there, an indorsement being made will enable the court to decree for him only so far as he appears entitled: if no *moduses* are found, to decree him tithes in kind: if any, then such *modus* arrears.

Eyre B. — Is the defence sufficient to prevent the court from decreeing tithes in kind? Now, by the paper of 1683, if the usage had been conformable to it, the vicar could not have claimed tithes in kind for the customary payments there. Yet besides the usage, some things on the face of the paper go to shake its authority. We cannot therefore make a decree upon the foundation of it. The compositions proved are consistent with both cases. The

issues therefore to be tried must be as directed by the Lord Chief Baron. As to the cross bill, the plaintiffs have mistaken their right; and as that which they pray cannot be decreed, it must be dismissed, and with costs, as the defendants are all brought here unnecessarily.

Hotham and *Perryn* B. concurred, and that the cross bill be dismissed with costs. (a)

1779.

Williams
v.
Williams.

H. 19 Geo. III. A.D. 1779. C. P.

Pyke v. Dowling. [2 Black. Rep. 1257.]

THIS was a case from the court of Chancery.

The plaintiff *Robert Isaac Pyke*, as vicar of *Chew Magna* in the county of *Somerset*, is entitled to all the tithes of the parish of *Chew Magna*, and the hamlet and chapelry of *Dundry* (except the tithe of some ancient demesne lands called *Overlands*), or to certain *moduses* for the same, and in lieu thereof.

The defendant *Dowling* is the owner and occupier of a certain farm and lands within the said vicarage and chapelry, or the tithable places thereof, and hath raised and kept many lands upon his said *farm, "and sets up a *modus* of 2s. 6d. to be paid to the vicar of the vicarage aforesaid, on 5 April in each year, being *Lady-day*, old style, in lieu of every tenth lamb in kind."

The question for the opinion of the court is, whether such *modus* of 2s. 6d. for every tenth lamb, to be paid on 5 April in each year, is a good *modus*, or not.

Heath for the plaintiff, argued that it was bad, as being too rank, and out of all proportion to the price of lambs in the time of *Richard the First*, according to the calculations of *Bishop Fleetwood* in his *Chronicon pretiosum*, and cited *Grascomb* and *Jefferies*, A.D. 1687, and *Layfield* and *Delap**, both mentioned in *Chapman* and *Smith*, 2 *Vez.* 506. to shew the antiquity of this objection. So, in *Lord Raym.* 1163.† *Powys* justice said, that such *moduses* were always over-ruled, when he sat in the exchequer. Accordingly in *Benson* and *Watkins*, *Bomb.* 10.‡ a very rank *modus* was over-ruled.

Grose for the defendant insisted, that though a court of equity might determine as they pleased, yet when they sent a question to be decided by the courts of law, it must be taken up upon legal grounds. Rankness, as it is called, is only evidence against the antiquity of a *modus*; but the question, whether the *modus* is good,

S. C.
Serj. Hill's
MSS.
vol. xi.
p. 517.
Rankness
of a *modus*
is not a
question of
law, but of
fact for the
purpose of
impeaching
its immemo-
riality.
*[1167]

Where a
case sup-
posed a
modus to
be immemo-
rial, the
court of
K. B. con-
sidered 3d.
a lamb not
a void
modus.
Supra 857.
Supra 560.
by the name
of *Layfield*
v. *Entick-*
napp.
* Supra
847.
† Supra
587.
‡ Supra
612.

(a) The issues were tried, and the jury did not find one of them. The court therefore ordered an account to be taken of the tithes demanded by the bill, and to tax the plaintiff his costs in

law and equity, and that so much of the bill as prayed an account of the tithes which were not admitted by the defendant's answer be dismissed with costs. 4 *Wood's Decr.* 81.

1779. must mean whether it is unreasonable or unjust, and that presupposes the *modus* to have existed, in point of fact, from the time of legal memory; and if so, what objection can be raised to this *modus* in point of law?

Pyke
v.
Dowling.

And by the court (in the absence of *Gould* justice): — Courts of equity, which are judges of both the fact and the justice of the case, may certainly over-rule a *modus*, where they see that the internal evidence against the possibility of its immemorial existence is so strong, that it would be nugatory or oppressive to send it to be tried by a jury. And (by *Blackstone* J.) so it was done by Lord *Hardwicke* in *Moore and Beckford*, H. 1750, 24 Geo. 2. who said he should be ashamed to send a *modus* of 30*l.* *per annum* to be tried by a jury, where the real value of the tithes was not above 60*l.* and decreed for the plaintiff, the parson, with costs. So in *Torriano* and *Legge* six different *moduses* were over-ruled for being too rank, without directing an issue to try any of them. But when its goodness is referred to a court of law, we must take it for granted, that the fact of its having immemorially existed is admitted, and only consider what objections may be made to it in point of law, as for uncertainty, inequality, &c. We shall certify our opinion to the chancery. (a)

Supra 909.

[1168]

The certificate was as follows:

“ We have heard counsel on both sides, and have considered this case; and as the case supposes the existence of the *modus* in question from time immemorial, which we conceive to be a question of fact, we are of opinion, that there does not appear any reason why this should be considered as a void *modus* in point of law.”

9th February 1779.

W. De Grey.
W. Blackstone.
G. Nares.

H. 19 Geo. III. A.D. 1779. Scac.

Fynes v. Ordoyno. [MS.]

S. C.

4 Wood's
Decr. 84.

A vicar endowed with all tithes and all profits, except, &c. held entitled to

LORD C. B. — This is a bill by the vicar of *Newark* for certain species of small tithes which he claims by endowment. The defendants, who are the occupiers, and impropriator, insist that the vicar is not entitled, because a pension of 10*l.* is paid by the impropriator to the vicar in lieu of all tithes, and he, the impropriator, is entitled to the tithes.

The vicar founds his title upon an endowment in 1428, giving all

(a) See also *Bertie v. Beaumont*, 2 Pri. 303. *infra.* *Layng v. Yarborough*, 4 Pri. 383. *infra.* *Drake v. Smith*, 5 Pri. 369. *infra.*

1779.

Fynes
v.
Ordovino.

them, subject to the exceptions where a pension was set up as payable in lieu of them, which appeared to be appointed during pleasure out of chantry lands.

tithes and all profits of the church, except the lands belonging to the church and the tithes thereof, and except the tithe of corn, hay, wool, and lamb, which are decreed to belong to the prior and convent of *St. Catherine at Lincoln* and the order of *St. Gilbert*, and subjecting the vicar to the payment of twenty marks yearly to the prior and convent. This endowment is a title, unless it has been since legally varied. The defendants insist that it has, and that 10*l.* pension has been given in lieu of the tithes. If it stands without evidence one way or the other, though the vicar has not received the tithes, the endowment is still to prevail.

The defendants have given parole and written evidence to prove a time when the vicar was not entitled to the tithes. The parole respects agistment-tithe, but no particular instances are specified except for a short time, and afterwards refused. Tithe of onions has been shewn to be paid to the impropriator in kind. Besides this, there has been much written evidence. 1. The *Liber Regis* in 26 *H.* 8. where it appears that the vicar is entitled to several species of small tithes, value 40*s.* &c. and liable to the payment of 10*l.* to one of the parish priests. Therefore all was not taken from him at that time.

2. The minister's accounts in 30 *H.* 8. The bailiff then accounted [1169] for 14*l.* 8*s.* for the farm of the rectory and tithe of grain, hay, wool, and lamb, and for some particular small tithes, at 8*s.*, and of small tithes in general of two persons, at 40*s.* A pension at this time was payable by the vicar. Here appear then to be other tithes besides corn, wool, and lamb belonging to the rector. But it is observable, that the small tithes over all the glebe were likewise reserved to the monastery. It is observable, too, that the pension to the rector was at that time payable.

3. Minister's accounts of 37 *H.* 8. Of the same amount; stating likewise the pension.

4. Minister's accounts of 1 *E.* 6. This states the pension of 13*l.* 6*s.* 8*d.* not answered for 20 years last past, because the profits of the vicarage were so inconsiderable as not to be equal to the discharge of it. From this time therefore there is no evidence respecting the pension.

5. 2 *E.* 6. A return of commissioners under 1 *E.* 6. for suppressing chantries, that an assistant was necessary to serve the cure in *Newark*.

6. In the Receiver General's account 3 *E.* 6. an article of 10*l.* payable to an assistant in the cure of *Newark* out of the chantry lands, during pleasure of the Court of Augmentations.

7. Particulars of a lease, shewing that the rectory had been demised for 7*l.* rent, and 10*l.* to the vicar.

8. Demise by the crown to the countess of *Rutland* of the rec-

1779.

Fynes
v.
Ordyna.

tory, with a covenant to indemnify the crown from payment of the 10*l*. Now it appears that the 10*l*. had been appointed during pleasure out of the chantry lands. After that time it had been charged on the rectory, which accounts for the covenant of indemnification. Hence it appears how the pension of 13*l*. 6*s*. 8*d*. had been discharged, and how that of 10*l*. became payable to the vicar. This is a very satisfactory account of the continuance of the vicar's right. He is therefore entitled to an account of the several tithable matters.

P. 19 Geo. III. A. D. 1779. Scac.

Broadley v. Brocklebank. [MS.]

S. C.

4 Wood's
Decr. 90.

[1170]

THE plaintiff stated that he had, for 36 years past, been entitled to all the tithes of corn, grain, hay, and potatoes, in kind, arising in *Tranby*, *Anlaby*, and *Walfreton*, in the parish of *Eboley* or *Kirk Elly*, in the county of *York*, and the tithable places thereof, formerly part of the possessions of the *Priory of Haltonprice*; that the defendants *Brocklebank* and *Bilton*, inhabitants and occupiers of several lands in *Tranby*, had, in 1776, planted large quantities of potatoes in the open fields, and dug them up and carried them away, without setting out the tithe thereof. He therefore prayed an account and payment of the same.

A vicar
whose en-
dowment,
coupled
with usage,
proved his
right to all
small tithes,
held en-
titled to
tithes of
potatoes as
against a
plaintiff
claiming
under the
title of im-
propriator.

The defendant, the vicar, denied that the plaintiff was rightful impropriator or rector of the parish, or that he was entitled to the tithes demanded by the bill. He said, that he believed he had purchased some portion of the great tithes of the parish, but could not tell what right he had so purchased; that much the larger part belonged to the heiresses of *R. Ellerker* deceased; that the said coheiresses were rectors and patrons of the vicarage; that the plaintiff was not entitled to the tithe of potatoes, or any other small tithes arising in that parish; but that he, as vicar thereof, was entitled thereto; that he had been vicar of the parish 42 years, and was presented thereto by *E. Bradshaw* deceased; that he and his predecessors had always received the small tithes within the rectory, or a satisfaction for the same, and in particular the tithes of potatoes; but that he had never seen the original endowment of the vicarage, nor did he know where to find the same.

The defendants *Brocklebank* and *Bilton* also denied that the plaintiff was impropriator or rector of the parish, or that he was entitled to the tithes of potatoes; and said that they had heard that he had purchased some portion of tithes, but what portion they could not say; they admitted that they were occupiers of lands in *Tranby*, and that they had planted potatoes in the open fields, and had dug them up and carried them away, after setting out the tithes to the vicar.

1779.

Broadley
v.
Brockle-
bank.

On the hearing the plaintiff proved his title to all the right of the impropriator within the three hamlets, and in order to disprove the vicar's prescriptive right to small tithes, produced an endowment of the vicarage, which, as he said, proved that the vicarage had its creation within time of memory. This endowment was dated 1344, but reciting that the Archbishop (who makes it) had by a former instrument appropriated the rectory to the priory of *Haltonprice*, reserving to himself the ordination of a perpetual vicar, the court thought that this was not certain proof of the vicarage having had its first commencement at this time. Added to which, the remaining part of this endowment enumerated many, viz. ten species of small tithes, and one of great, for the support of the vicar. Among these were *decimæ quadragesimales*, which might [1171] comprehend any species of tithes payable at *Lent*; and then followed a reservation to the monastery of the tithe of agistment of their own cattle, and of the tithe of their own garden, two species of tithes which were not enumerated by name, and which therefore need not to have been reserved, unless they would have passed to the vicar under the words *decimæ quadragesimales*. The parol evidence in the cause proved generally the enjoyment of all small tithes by the vicar, except in one instance, where the rector had about thirty years ago received the tithe of potatoes the first time of their cultivation in the parish. The court therefore clearly thought, that the endowment, coupled with the usage, proved the right to all small tithes to belong to the vicar; consequently, that the plaintiff's bill must be dismissed, because, though the court might have required more proof if the vicar had desired to have his right established, yet this was sufficient to prove that the plaintiff could not make out his right to that which he demanded. There was also given in evidence a *nova ordinatio*, as it was entitled, made about a century afterwards, whereby the then archbishop, upon a suggestion that the monastery was so far impoverished as to be unable to maintain its due hospitality, did, with the consent of the then vicar, ordain that the monastery should for the future pay to the vicar only 20 marks a-year in lieu of the portions of tithes which had been allotted to him. But there being no evidence whatever that this payment of 20 marks had ever been made, but, on the contrary, there being evidence that the small tithes had been enjoyed by the vicar as far back as the witnesses remembered, it was presumed by the court that this instrument had never been carried into execution. The bill therefore was ordered to be dismissed, but without costs. (a)

(a) *Dorman v. Curry*, 4 Pri. 109. *infra*. 2 Pri. 329. *infra*. *Williams v. Price*, 4 Pri. *Kennicot v. Watson*, 2 Pri. 250. *infra*. *Byam* 156. *infra*. *Scott v. Lawson*, 7 Pri. 267. *infra*. *v. Booth*, 2 Pri. 360. *infra*. *Cunliffe v. Taylor*,

1779.

Tr. 19 Geo. III. A. D. 1779. Scac.

Calmell
v.
Sherratt.

Calmell v. Sherratt and others occupiers, and *Muchell* vicar.
[MS.]

S. C.
4 Wood's
Decr. 94.
by the
name of
Calmell v.
Giffard.

[1172]

A vicar
under his
endowment
accompa-
nied by
usage, held
entitled to
all small
tithes, ex-
cept wool
and lamb, as
against the
lessee of the
dean of
Litchfield
the approp-
riator.
Bill dis-
missed with
costs.

The lessee
of the im-
propriator
not having
made the
patron of
the vicarage
a party, not
allowed to
proceed on
the prayer
to establish
as against
the vicar.

THIS was a bill to establish the plaintiff's right as lessee of the dean of *Litchfield* against the vicar, and for an account of all small tithes, and some others against the occupiers. The patron of the vicarage not being made a party, the plaintiff could not proceed upon the prayer to establish; he therefore (rather than let the cause stand over to amend) waived that part of his prayer. To prove his case he merely produced a lease of all tithes belonging to the rectory, excepting the vicarage and its tithes. The vicar gave in evidence an ancient copy of an endowment *in toto alteragio, agnis, et lana, et principali legato*, with marginal notes accounting for non-payment of lamb and wool, and the strongest proof, both from the plaintiff's witnesses and his own, that he and his predecessors had received constantly money payments from the different inhabitants at *Easter* annually, under the name of *Easter dues*, different in quantity, viz. many of 1s., 2s. 6d., 3s., and some of 12s. and 15s. which from their magnitude could not be mere *Easter* offerings, and which were constantly in the parish understood and reputed to be a composition for all small tithes except wool and lamb, and except hemp and flax; that the vicar had received distinct payments for hemp and flax, usually at the rate of 4s. and 5s. an acre, and had likewise received from foreigners having land within the parish, sums under the name of *herbage money*. Some of the *Easter* dues were likewise paid for lands on which no horses had for some time existed. Besides this, he produced a survey out of the dean and chapter's registry, supposed to be the *parliamentary survey*, in which the small tithes, except lamb and wool, were said to belong to the vicar. Against this there was no evidence except one witness as to herbage of sheep, which proved no more than that the rector was entitled to tithe of wool. As to the occupiers, they proved payment to the plaintiff of all but small tithes, except in one instance of half a year's hay, which being doubtful, an account was directed as to that at the peril of the plaintiff. As to all the rest the bill was dismissed, and the only question was respecting the costs. The plaintiff urged his right at common law, and the usage to let him try it without costs. But the court thought this so very plain a case, all the evidence of endowment being within the plaintiff's own reach, as well as of usage and reputation, (either endowment explained by usage, or usage alone being sufficient for the vicar,) that there wanted *probabilis causa litigandi*; and as his demand was without a shadow of foundation, and that to his

own knowledge, he ought to pay the costs; and so it was directed. (a) 1779.

Tr. 19 Geo. III. A.D. 1779. Scac.

[1173]

Robinson v. Barroby. [MS.]

THIS was a bill to establish customs of tithing. The defendants denied the customs, but acknowledged that they had tithable matters which were unpaid if due in kind. The counsel for the plaintiff stated, that the evidence was so strong as not to bear controversy. But the court said, that customs never were *established* without trial at law, where the defendant denied the custom, unless the defendant should waive an issue tendered. And this was admitted to be the practice on all hands.

S. C.
4 Wood's
Decr. 100.
Customs
not esta-
blished
without a
trial at law,
unless the
defendant
waives an
issue.

Tr. 19 Geo. III. A. D. 1779. Scac.

Jeremy v. Strangeways. [MS.]

THIS was a bill by the vicar of *Murlinch* in *Somersetshire* against the impropriator and occupiers, for an account of tithe of seed-clover, and to establish his right. On evidence of a general immemorial receipt of all small tithes arising within the parish, except the tithe of clover-seed, which alone appeared to have been paid to the impropriator, the court decreed an account from the time of filing the bill, it not having been demanded before, and to establish the vicar's right. And as one of the witnesses stated that the payments of clover-seed tithe had been made to the impropriator under a mistaken notion (which long prevailed even in courts of law) that the seed followed the nature of the grass, and belonged as such to the impropriator, to whom the tithe of hay belonged; the court decreed it without granting an issue, though that was asked by the impropriator; but without costs (notwithstanding it was alleged that in all the former cases costs had been given), because the vicar appeared for so long a time (seven or eight years after becoming so) to have acquiesced in the payments to the impropriator, and not to have claimed it but by his bill.

S. C.
4 Wood's
Decr. 587.
A vicar in
the percep-
tion of all
small tithes,
except the
tithe of
clover-seed,
which has
been paid
to the im-
propriator
under a
mistaken
notion that
the seed fol-
lowed the
nature of
the grass, is
entitled to
that species
of tithe.

Tr. 19 Geo. III. A.D. 1779. Scac.

[1174]

Scott v. Airey and others. [Sir J. Mitford's MSS.]

THE bill was filed by Dr. *Scott*, as rector of *Simonburne* in *Nor-thumberland*, for the tithes of corn and grain of a farm called *Eal's*

S. C.
Serj. Hill's
MSS.

(a) In Mr. Baron *Eyre's* notes of this case, it is stated that the bill was dismissed against the defendant *Sherratt*, because it turned out in evidence that the plaintiff had made a lease of his tithes in that district in which *Sherratt's* lands are

stated in his answer to lie; which makes an equitable nonsuit; that it turned out too, that the tithes demanded as against *Boodle* had been paid. Vide 4 Wood's Decr. 94.

1779.

Scott
v.
Airey.

vol. xxi.
p. 136.
apparently
copied from
the same
notes with
the text.
4 Wood's
Decr. 105.
Where a
defendant
claims a
portion of
tithes, and
supports
that claim
by evidence
of long
possession,
a court of
equity will
not inter-
pose, but
leave the
plaintiff to
his legal
remedy.

Farm; for the tithes of corn from *Park End Farm*, *Linkurst Farm*, *Lotterford Door Farm*, and *Hillhouse Farm*; for agistment-tithes of *Haughton Strother's Farm*, and *Knott's Farm*; and for the tithes of milk from *Lee Hall Farm*. Several of the defendants were occupiers of some of those farms; and the defendants, the *Aireys*, were owners of part of the lands, and claimed the tithes of *Eal's Farm*.

The principal question was, whether the plaintiff was entitled to the tithes of corn and hay of the lands of which the *Aireys* claimed those tithes?

In delivering the opinion of the court, *the Chief Baron*, after stating the case, observed, that the present case was not a demand of tithe for land which had hitherto paid no tithe, and that the defence was not a prescription in *non decimando*. In all such cases (he said) the rule has been, that a person setting up an exemption from the payment of tithe must shew the particular ground of exemption. If that is not shewn, the defence amounts to no more than a mere non-payment of tithe, which, however long, is no defence. But, in the present case, the plaintiff claims the tithe of land of which tithe has been constantly taken. For, although a part of the land has not actually paid tithe, it has been no otherwise exempt, than because the tenant of that part has been tenant of the tithe of all.

The tithes having been actually paid, the next question is, how they have been paid. They have been paid from particular lands in the nature of a portion of tithes. It appears that in 5 Ja. 1608, these tithes were in the possession of the *Ridleys*. A fine was then levied of them by *Ridley* and his wife. They were afterwards devised by his son in 1673. His grandson in 1674 devised them to trustees in trust to sell. They were actually sold to *Whitfield* in 1683. They were afterwards the subject of a family settlement on the marriage of a daughter of *Whitfield* in 1704. In 1708 they were conveyed in fee to *Green*. They were afterwards mortgaged, and different assignments were made of the mortgage. They were [1175] then again devised by the mortgagee, and the devisee purchased the equity of redemption, and devised to persons under whom the defendants, the *Aireys*, claim. For 170 years they have been the subject of sales, mortgages, and devises, as other property, and have been always considered in the same light as the other real property of the persons who from time to time have claimed them. They were capable of being enjoyed by the persons who have enjoyed them; and the question now is, whether a court of equity ought to interfere to take the possession from persons who have been in possession for so many years with knowledge of the rector. It does not appear how the *Ridleys* became entitled; but it appears, that being in possession, they settled, mortgaged, and devised the

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tithes as their own absolute property. If, notwithstanding this long possession, the plaintiff is legally entitled, he is not without remedy. But it is too much in a case of this kind for a court of equity to interpose, and after so long a possession, to take the property from the possessors, and decree the rector entitled to it. The court has been pressed to direct an issue; but there seems no reason for the court to interpose thus far. Whether the court directs an issue, which adopts in some degree the plaintiff's demand, or leaves the plaintiff to pursue his legal remedy, he may make good his demand, if it is well founded. It is therefore not absolutely necessary for the court to interpose.

Eyre B. — The principal question in this case is the defence set up by the *Aireys* against the *prima facie* title of the rector, founded on a title set forth in their answer, and the indisputable fact of actual possession, occupation and pernanacy of the tithes. The distinction between a prescription in *non decimando*, and a claim of a portion of tithes, is an essential distinction. A prescription in *non decimando* is simply unlawful. No such prescription can be maintained. If no tithes have been paid, a title founded upon mere non-payment is simply a prescription in *non decimando*. Evidence of length of possession the court can pay no regard to; for the possession must have been unlawful, and the court is therefore bound to decree in favour of the common right. No presumption can be admitted to support a mere simple prescription in *non decimando*. If we depart from this rule, we overturn the whole law upon the subject. But there is a great difference between a claim founded on mere non-payment of tithes, and a claim supported by evidence of actual enjoyment of the pernanacy of tithes. The title is not unlawful. A good title may have been derived to the party in possession [1176] The title therefore not being simply unlawful, long possession is evidence of the title. The case of *Fanshaw and Rotheram*, stated *Infra* 1177. at the bar, appears to me, from a note I have seen, to have been mistaken. The ground of that determination seems to have been, that however doubtful the case stood as to title, there had been long possession: the claim was of a portion of tithes, the parties might have a good title, and it was not right for a court of equity to disturb the possession. The doctrine was good applied to that or to this case. There is no difference between a lay impropriator and a rector. The lay impropriator becomes as it were a spiritual person: he holds in the same right. If it is not proper to disturb a possession in favour of a lay impropriator, it is not proper to disturb it in favour of a rector. The arguments at the bar have run wild on the head of presumption. We are to presume so much as to destroy the whole law. For if upon mere possession every thing is to be presumed to maintain that possession, there was no necessity

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for the statutes of limitation. It will be better for every person in possession to burn his title deeds, and rest wholly on presumption. In the case of the crown and of the church, there is a maxim standing in the way, *Nullum tempus occurrit regi (a), aut ecclesiae*. It is difficult to settle the bounds of this maxim. It is clear that the crown and the church shall in no case be barred by such imputed laches, as would bar private persons: that the statutes of limitation shall not extend to them. Whether the maxim should go farther, I much doubt. With respect to presumption arising from the acts of other persons, I think it ought to have the same force against the crown and the church, as against private persons. In the case of *Alderman and Chitty's will (b)* it was presumed, that the first sheet of the will was in the room at the time of the execution of the second sheet which was attested by the witnesses. Suppose the crown had been interested to contest that will; I think the same presumption ought to have prevailed against the crown, as did prevail against the heir at law. In old recoveries a good tenant to the precipe is presumed. If the crown is a party, there ought to be the same presumption against the crown, as against the heir. Presumption upon the acts of parties ought to be made with as

[1177] much force against the crown and church, as against other persons. But nothing is to be presumed against laches of the church, their not claiming. The maxim has there its full force. I have said thus much, that it may not be imagined we have gone too far on the doctrine of presumption. I agree with the Lord Chief Baron upon the ground of great length of possession, and the claim being of a portion of tithes, which might be lawful, that the bill ought to be dismissed.

The other barons concurred in opinion with the Lord C. B. and B. *Eyre. (c)*

The case of Fanshaw v. Rotheram, cited in the preceding case, and determined March 14th 1759 at Lincoln's Inn Hall, appears by the note which was produced in the argument to have been as follows [Reg. Lib. A. 1758. fo. 264.]:

S. C.
1 Eden
276.

The plaintiff brought his bill for an account of tithes. The defendant insisted by his answer that he, and they whose estate he had

(a) See st. 9 Geo. 3. c. 16. (b) 3 Burr. 1773.

(c) *Edwards v. Ld. Vernon*, in the Exchequer 23d February 1781, on a bill brought by a spiritual rector for tithes, the defendant set up a title to the tithes under family settlements and possession for 171 years, as a lay fee. Barons *Eyre, Hotham, and Perryn*, thought the case of *Scott v. Airey* was determined on right grounds: "that a court of equity ought not to assist against long possession;" and that case having been acquiesced in, they thought they ought to

dismiss the present bill, as they did that of *Scott v. Airey*, with costs, and they gave judgement accordingly. After 171 years the court presumed the appointment of a vicar and consolidation with a curacy. (See also *Strutt v. Baker*, 2 Ves. jun. 625. *infra* 1490.)

Vide Rot. Parl. 8 & 9 E. 2. A. D. 1315. No. 6. petition of the bishop of *Durham* as to grant of lands in the franchise of *Werk* in *Tynedale*, and the patronage of the church of *Symundburn*.

in the lands whereof the tithes were demanded, had a title to the tithes. It was in proof in the cause, that the defendant and those under whom he claimed had been in possession above 100 years; and several conveyances intervening without any claim from the plaintiff or his ancestors, it was insisted, that there had been a severance of the tithes from the rectory; or, that there had been some grant or deed, whereby the plaintiff's ancestors, or those who had the right to the rectory, had exempted the defendant's estate from the payment of tithes.

mando against a lay impropriator. The deed of severance must be produced, or evidence that it has existed. Bill by impropriator dismissed where the defendant, and those under whom he claimed, had been in pernaney of the tithes more than 130 years.

The Solicitor General, *Wilbraham* and Sir *Anthony Abdy* for the defendant.

The defence in the present case is upon a title, and not a *non decimando*. The question is not upon a subtraction of the tithes, but who has a right to them; and we submit that this case shews a right in the defendant to the tithes in question. But abstracted from the title it may be material to consider the general point, whether, in the case of a lay impropriator, a defendant can say in bar of a demand of tithes, that no tithes have ever been paid or demanded for his lands.

It is quite clear that it would not be good against a spiritual person; but the maxims and principles of the common law with regard to spiritual persons cannot apply to lay impropriators. Very great privileges were extended to the former in favour of religion; "and the law," says Lord *Coke*, "had great policy therein; for the decay of revenue of men of holy church, in the end, will be the overthrow of the service of God and religion." Bishop of *Winchester's* case. For this reason extraordinary strictness was attached to these alienations; bishops could not alienate without consent of their chapters, or rectors without the consent of their patron and ordinary. Bishops were considered as seised solely *ad meliorationem ecclesiæ*; it was not till 26 *Hen.* 8. that they were liable to forfeiture, and that was afterwards restrained by 2 *Ed.* 6. to their own estates. The statute of limitations, and the rules of the common law with respect to bar, did not operate against them. In matters of evidence entries by a deceased rector were admitted as evidence in favour of his successor. The reason given by Lord *Coke* in the above cited case, why a layman could not prescribe against a spiritual person, fails in the case of a lay impropriator; viz. that if such a prescription should hold in the case of a spiritual person, a jury of laymen would not be equal to the trial of it.

It is true that it has been determined in several cases, that a layman cannot prescribe in *non decimando* against a lay impropriator

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very fully
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Ambler's
MSS.
There can-
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in *non deci-*

1 Eden
279.
Chiefly
taken from
a copy of
Mr. Wil-
braham's
argument.

Supra 167.

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* *Supra*

167.

† *Supra*
385.‡ *Supra*
757.§ *Supra*
780.

|| p. 701.

Supra 952.

*Bishop of Winchester's case.** *Slade v. Drake.* † *Corporation of Bury v. Evans.* ‡ *Shelley v. Penniford*, Feb. 21. 1707. *Fanshaw v. More*, Trin. 1749. § But several of these were determined with very great doubt. In *Bury v. Evans*, Mr. Baron Parker appeared at first to have been against the resolution. In *Fanshaw v. More*, Mr. Baron Clarke says, "I know no case that deserves more consideration than this kind of question; because, though there are great authorities that a layman cannot prescribe in *non decimando*, yet the reason of the thing grows weaker every day." In || *Benson v. Olive* the court was divided in opinion: and from the late determination in *Jennings v. Lettis* there is an appeal, and it is *adhuc sub judice*. There are many resolutions which have stood longer than this has done, and yet, when the inconveniences of them have been explained and understood, they have been set aside.

The importance of this case is very great, as it appears in *Cowell*, title *Impropriations*, that there are 3845 impropriations in *England*, and it is certain that the tithes of all, or many of them, may be severed. But if the deeds of severance are lost, must the right be lost too? No man can preserve his title-deeds for ever; and it would be contrary to all rules of law to say that the original title shall be produced, and yet that the loss of it cannot be supplied by any other evidence: this would be constituting a new species of inheritances *quandiu* the title-deeds existed. Suppose a lay impropriator should by deed for a valuable consideration discharge all the tenants in the rectory from the payment of tithes, is it just or reasonable that 500 years hence, when time has destroyed the deed, that he will have a right to resume and demand the tithe? But if the determination in *Bury v. Evans* should prevail, the right to the rectory might be set up at any time upon the unjust supposition of his right to take advantage of the deeds of discharge being lost.

It is said in *Cowell*, title *Rectory*, that *rectoria* signifies an entire parish church; with all its right, glebes, tithes, and other profits whatsoever. And *Spelman*, under the word *Rectoria*, says, "it is often used for the rectory, manse, or parsonage-house;" but these definitions in no way belong to a lay impropriation, which is a mere temporal right, and the associating ideas of it, which belong only to rectories in spiritual persons, seems to be the ground on which the resolutions in *Bury v. Evans* and *Fanshaw v. Moore* proceeded. But if these ideas are separated, and none are annexed but what properly belong to a lay impropriation, it seems to destroy all the foundation upon which those cases depend. In *Fisher v. Cooke*, *Michaelmas*, 12 Geo. 1. it was said by Gilbert C. B. that the rule of the canonists, that there can be no *non decimando* by a layman, is founded on two reasons: 1st, That the clergy have divine right

Supra 757.*Supra* 780.

to tithes, a reason which is now indeed exploded; but, 2d, That the parson, tenant for life, may live longer than any of his parish, and so by his neglect, &c. if it were to prevail, the very support of the church would be destroyed; but it is plain, that neither of these reasons can affect the present case.

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It may be said that no prescription can be set up in this case for the defendant, because, as tithes became temporal inheritances upon or after the dissolution of the monasteries, which being within time of memory, no prescription can arise concerning them. But this argument does not hold, because, though, as *Mr. Selden* and *Lord Coke* observe, a layman was incapable of taking a grant of the pernaney of tithes before the dissolution of the monasteries, yet it may be proved from the same authorities and otherwise, that he might take a discharge from tithes out of his own lands in way of retainer. *Wright v. Wright*, Cro. Elix. 512. Bishop of *Winchester's* case, 2 Co. 44. a. and *non constat*, but that there might be such old grant by the parson, patron, and ordinary, to discharge the lands in question from the payment of tithe. Supra 167.

But supposing the cases of the *Corporation of Bury v. Evans* and *Fanshawe v. More* to stand in their full force, yet being different from the present case they ought not to controul it. In both those cases the defence was merely upon the non-payment, and nothing else. It was a pure *non decimando*: the present case amounts to a title.

The first statute for the dissolution of monasteries was the 27 H. 8. c. 28. which gave all the lesser monasteries not exceeding 200*l. per annum* to the king. The next statute was 31 H. 8. c. 19. which gave the possessions of the greater monasteries to the king, discharged of tithes as held by the abbot and priors. Great part of the property of the kingdom being thus changed and altered, it became necessary to the legislature to interpose in order to settle this new kind of property; and therefore the 32 H. 8. c. 7. provides, that the like privileges and remedies should be had upon these estates as the law gives to other temporal inheritances. In *Watson's Clergyman's Law*, c. 53. p. 581. it is said, that tithes and other ecclesiastical duties that came to the crown by the statutes 27 H. 8., 31 H. 8., 37 H. 8. and 1 E. 6. are by those statutes, and this of 32 H. 8. and 1 & 2 Ph. & M., in the hands of laymen temporal inheritances, and shall be accounted assets, and husbands shall be tenants by the courtesy, and wives endowed of them, and shall have other incidents belonging to temporal inheritances, only that they retain the ecclesiastical quality that the owner may sue for the same in the Ecclesiastical Court. 1 Co. Litt. 159. In 1 Ro. Abr. 653. it is said, that a layman cannot prescribe in *non decimando* without special matter; which plainly implies, that with special mat-

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ter he may prescribe, and the book says, that he is capable of a discharge of tithe even from the church. In the present case, the special matters assigned are the deeds and recovery, all evidences of a title, as well as the long uninterrupted enjoyment, without any demand for tithes being made. In Sir *Simon Degge's Parson's Counsellor*, pt. 2. c. 2. it is said, that there were infeudations of tithes before the parochial tithes were settled is without dispute, both here in *England* and in other kingdoms. And having cited these words from Linwood, *Bene potuerunt laici decimas in feudum retinere et eas alteri ecclesie dare ante Concilium Lateranense non tamen post*, the book a little after goes on thus: But notwithstanding this constitution, many of the abbots held out against the parish priests, who durst not, or were not able to contest them; and, after claiming the tithes by prescription, that is, by forty years' possession, which is a prescription allowed by the ecclesiastical courts; and that is the reason that many portions of tithes are at this day held by impropriators that have been gained by the abbots by such prescriptions, and not by their original grants. And by this means they got their prescription *de non decimando*; for the canon law does allow one clergyman to prescribe against another, but not a layman by any means to the prejudice of the church. Considering therefore the present claim as a temporal inheritance, it is clearly barred by the title; and possession set up, and considered as an ecclesiastical estate, is barred by the prescription of forty years.

Let us next consider the effect of the evidence which we have given in the present case. It is sufficiently clear that the tithes have never been paid to the impropriator, and that they have always been let or taken by the owner of the premises. Such a title would be clearly good as to land, where the courts have carried the doctrine of presumption to a very liberal extent, *omnia presumantur rite esse acto*. Presumption is the evidence of things not seen, where from an apparent you may infer a probable cause. He cannot produce any release or grant of the tithes in question, yet what is produced is such evidence of tithe as that a court ought to presume it. To suppose the contrary, must be to suppose that one family has for many ages together encroached upon and retained the property of the other, which has sat by without preferring its claim. In a bill brought for a rent equity will not establish it, if it is not brought in a reasonable compass of time. Length of times presumes a release, or what is equivalent, a grant to the owner of the land. An ancient deed proves itself from presumption, a lease will be presumed from an old release: in ancient recoveries a good tenant to the præcipe has always been presumed. In sir *Francis North's* argument, in *Potter v. North*, 1 Vent. 187. it is said ancient

grants happen to be lost many times, and it would be hard that no title could be made to things that lie in grant, but by shewing of a grant; therefore upon usage time does not run, and the law presumes a grant and a lawful beginning, and allows such usage for a good title. And another case was cited of lord *Stafford v. Llewellyn*, *Skin.* 77., where lands were conveyed to trustees upon trust, amongst other things, to settle on lord *Stafford* for life, with power of leasing. Lord *Stafford* made several leases, but it not appearing that the trustees had made the settlement, the question was, whether the leases were good; and there having been a long possession under them, the court said, that they would presume that my lord had made some conveyance from the trustees to enable him to make the leases: and here one *Farrer's* case was cited, which was in C.B., where *Farrer* made a title from the Black Prince, which could not be out of him but by an act of parliament; but yet for that though possession had gone otherwise ever since, the court presumed that there had been such an act, though not now to be found.

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The reason why courts of equity interpose in cases of this kind, is in respect of the account prayed: it is therefore wholly in the discretion of the court to give relief or not; and here it seems most reasonable, that the court should not interpose till the right is established. This is a mere legal right, and no equity whatever, except the account. In the cases of *Medley v. Talmey*, and the *Mayor, Aldermen, and Burgesses of Warwick v. Lucas*, cited *Com. Rep.* 652, 653., the court of Exchequer dismissed the bills, unless a trial at law was first had; and in *Fanshaw v. Jordan*, in the Exchequer, the court also refused to interfere. If we have made out a right, the court must dismiss the bill. Supra 765.
Ibid.

The plaintiff's remedy is at law, therefore; and that it is so may be proved from several cases. In *Harpur's* case, 11 *Co.* 25., it was agreed, that an ejectment would lie for tithe, though there was an objection in that case on account of the uncertainty. In *Priest v. Wood*, *Cro. Car.* 301., it was expressly held, that an ejectment lies for tithes only. In *Heynes v. Stroud*, *Old. Bendl.* 148., held that an ejectment would lie either for a rectory or a portion of tithes; but that there was a difference between a rectory and a portion of tithes, for the portion ought to be demanded as such. So also in *Camel v. Clavering*, *Raym.* 789., it was held, that an ejectment would lie even for small tithes: it was objected that eggs were small tithes, and that it is absurd that an ejectment would lie of an egg; but the court said that an ejectment would lie of wool, being tithes, and by the same reason of an egg.

As to the cases in the court of Exchequer, this court has, whenever it has thought it necessary, gone in opposition to the received opinions of ecclesiastical learning. In *Walton v. Tryon*, lord Hard- Supra 827.

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827.

wicke determined against the decision in * *Greenway v. Earl of Kent*, that timber trees above 20 years' growth were not tithable as to lop and top.

The *Attorney-General* and *Perrot* for the plaintiffs.

The defendants, admitting the common law right of the rector, found their claim upon discharge, and therefore must have a derivative title by way of severance. A discharge from tithes could only be made out, originally, in two ways; by prescription or grant. Prescription was only allowed to spiritual persons, and there never has been any doubt that there could not be a prescription in *non decimando* against an ecclesiastic by a layman. The reason given in the bishop of *Winchester's* case is, that a layman could not hold tithes in perannuity.

Tithes were given originally for the maintenance of the church; it was necessary therefore to secure them against the oscitancy and ignorance of the clergy. But as all property could be aliened, *cōcurrentibus eis que in jure requiruntur*, they might be discharged by real composition, and grant by parson, patron, and ordinary; but as, according to the authorities of *Slade v. Drake*, *Hob. 8. E. 4. c. 4. Reg. 88. F. N. B. fol. 41. (ed. 2.)*, it could not be without a recompence to the church, which was to be shewn in pleading. In cases of grant of discharge, all the books agree that the loss of the deed is the loss of the discharge; if the evidence of them is lost, the things themselves are lost; if a spiritual person had prescribed in *non decimando*, and it was shewn that the lands had come into lay hands, the prescription was broken. Lord *Hobart* also says, that the case of tithes differs from all other cases; for whereas prescription and antiquity fortifies all other titles, and supposes the best beginning that the law can give them, yet in the case of tithes it works the contrary; for even the grant of parson, patron, and ordinary, though good in time, yet when it runs out to prescription it dies and perishes: and touching the discharge of tithes, and the pleading thereof at common law, it is to be observed that they are things due of common right; and therefore, when you have a prohibition in discharge of tithes, you must consider it as a plea in bar of a common right, and you must satisfy the court of your discharge: therefore, though a spiritual person might prescribe in *non decimando*, a layman could not.

After the dissolution of the monasteries, the legislature, aware that the prescriptions would be put an end to by coming into lay hands; provided for this circumstance by enacting that impropriations and tithes should be held in the same manner as they were by the religious houses; therefore, though it is said, and truly, that they are lay fees, yet they are not so to all purposes; and in the hands of the crown and the patentees, they are entitled to exemp-

tion from being prescribed against by laymen. It was therefore very solemnly determined, and upon very mature deliberation, in the case of the *Corporation of Bury v. Evans*, Com. 643., that a *non decimando* can no more be allowed against a lay impropiator than against an ecclesiastical rector: this was followed in the late case of *Fanshaw v. More*; and there is an old case to the same purpose of **Webb v. Warner*, Cro. Jac. 47. In †*Jennings v. Lettice*, the court of Exchequer has pursued the current of authorities, though the parties indeed have not acquiesced in it. The case of *Fanshaw v. Jordan* is not in point; it was not as to prescription in *non decimando*: the defendant insisted upon a title in himself that *Stainrode* was seised to and had been conveyed to him; he did not desire a presumption of the deed of severance: but, in the present case, the answer says, that the tithes were severed, but by whom the defendant does not know. If the deed of severance is not to be shewn, it is a chicane; you do not know what deed to presume. Mere non-payment can be of no avail; for if a layman cannot prescribe, if immemorial non-payment alone cannot discharge, modern non-payment can be of no effect in raising a presumption.

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* Supra
226.
† Supra
952.

It is said that the impropiator might bring an ejectment; but what impropiator would be rash enough to admit himself out of possession, which bringing an ejectment would do? As to the hardship that may attend this case, that is perfectly immaterial; for if the law is settled, the court is bound by it. But the mischief to lay impropiators would be as great in not allowing the rule as it can be to allow it against persons claiming; and it is no new thing to say, that a right is lost when the evidence of it cannot be produced: toll-thorough is lost if no consideration can be shewn; so felon's goods cannot be claimed without shewing the grant.

The *Solicitor-General* in reply. — Though the plaintiff may have title of common right, yet if that title be doubtful, whether it be subsisting or extinguished, this court may not think proper to interpose; this is not a mere prescription in *non decimando*, it is a title. The objection, that we cannot shew pernancy, is not conclusive: defendant was lessee of all the lands of which tithe is claimed; so that both in the case of himself and his grandfather, no more could be done than to retain them: if he had demised the tithes with the land, though there was no separate rent reserved, though there had been no apparent pernancy, yet the rent would have been increased in consequence. As to *Dronfield* our title is clear, and as to *Stubley* it is presumable. However defective our conveyances may have been, they shew a severance, and take the title out of the plaintiff.

Lord Keeper *Henley*. — I will first give my opinion on the

1779. points of law made in this case, abstracted from any equitable consideration.

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* The first question is, whether a man can prescribe in a *non decimando* against a lay impropriator? And I am clear that he cannot. The books are all uniform as to this point at the common law as against all spiritual persons: and however obscure the reason of such a rule may be at this day, whether in favour of ecclesiasticks, as the books say, or for whatsoever other reason; yet, when it has so long prevailed, though no reason for it can be shewn, it must be presumed, that it took its first rise in some public utility. And I think, when a point of law is fixed, though the judge, who is to determine, can give no reason for the fixing of it; or, though the reason generally assigned for it be not satisfactory to him, he is nevertheless bound to determine according as it is fixed, and has no power whatever to depart from the law. I think, however, that this further reason may be given, that if a person could have prescribed in *non decimando* at common law, it would have opened a door to many alienations which the law did not mean to encourage. I am therefore clear in this, that, as at common law a man could not prescribe in *non decimando* against a spiritual person; so neither can he now against a lay impropriator: for the lay impropriator stands exactly in the same light as the spiritual person did before the dissolution of monasteries; and by the grant in this case the rectory undoubtedly became a lay fee.

The second question is, whether it is not necessary in setting up a discharge from tithes to produce the deed or grant whereby the lands are discharged? (a) which is, in substance, no more than this, whether a man can set up a conveyance from a parson, with the consent of the patron and ordinary, without producing the grant? And I am clear, that he cannot. *Regist.* 58. By alienation the spiritual fee becomes lay, and is to be determined by the same rules as other lay rights are. In prohibition the person claiming such an exemption was bound to plead it, and specially to satisfy the court of the sufficiency of the discharge; for tithes were of common right due, and, consequently, he was bound to produce the deed whereby he claimed his discharge. *Hob.* 297. *Supra* 385. and all the books of entries prove this. So is the *Bishop of Winchester's* case, 2 *Rep.* 38. (b) Therefore, I think that no man at common law could avail himself of a discharge without producing the deed or grant under which he claimed it.

(a) "Or to prove that such grant existed and is lost." From his lordship's manuscript, 1 *Eden* 292.

(b) According to Lord Northington's MS. 1 *Eden* 292. *Slade v. Drake*, *Hob.* 297., and

the *Bishop of Winchester's* case, *Co. Rep.* 38., were cited by his lordship for another purpose; and some shade of doubt is thrown on the law as to that point. See the same.

In the next place then consider this upon the statute of 31 H. 8. 1779.

By this statute the lay impropriator stands exactly in the same situation as the spiritual person did before it was passed. *Com. Rep.* 651.* *Hob.* 296.† Therefore, as no person can prescribe against the spiritual person, consequently it is clear, that you cannot set up a general discharge against a lay impropriator. It is to be observed that before the 32 H. 8. a man could not sue for tithes in the temporal courts: at common law an appropriation was a spiritual fee, though the spiritual courts could not take cognizance, if a person, who had no right, took away the tithes which were set out; for he was a trespasser, and case lay.

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• *Supra*
757.
† *Supra*
385.

It is true *longa et diuturna possessio* is as strong a title as any in law, and in most cases the courts will presume any thing in favour of it. It is a title to defend upon and to recover upon. (a) But, though this be generally so, yet the case of tithes is an exception, for simple possession was not sufficient against an ecclesiastical person; and if not against him, then not against a lay impropriator, who stands in the same light. Yet I would not be understood, as if a judge would in all cases expect the production of the very deed or grant of exemption; but the best evidence the nature of the case will admit, as that such a grant did once exist, and concomitant evidence, or the like.

Having considered these points of law in the abstract, I will now consider them as applied to the determination which this court must make.

I am of opinion, that this by the grant became a lay fee; and the dispute as between those entitled to the spiritual fee or rectory must stand on the same foot, and be determined by the same law, as any other right or fee. In this case the plaintiff makes no particular title at all; he would have the court presume that his right descended to him; but does not shew any one family settlement, &c. for a great number of years (above forty) where this is mentioned; and yet he prays the court to interpose against a possession, which has been in the defendant and his ancestors above a century.

It is urged, that the law says, *Caveat emptor*; but equity says, *Teneat emptor*, if he is a fair purchaser. The defendant appears to me as a fair purchaser, there having been several intermediate conveyances, and possession having gone along with them, for above 130 years; and therefore equity will not interpose to disturb him.

(a) See *The Mayor of Kingston upon Hull v. Horner*, Cowp. 102. *Powell v. Milbank*, cited, *ibid.* *Earl v. Baxter*, Bla. Rep. 1228. *Rogers v. Brooks*, 1 T.R. 431. n. *Doe v. Sybourn*, 7 T.R. 2. *Jones v. Jones*, *ibid.* 47. *Orenden v. Skinner*, *infra* 1513. *Campbell v. Wilson*, 3 East 294. *Holcroft v. Heele*, 1 Bos. & Pull. 400. *Roe v. Ireland*, 11 East 280. *Lady Dartmouth v. Roberts*, 16 East 334. *Yard v. Ford*, 2 Saund. 175. n. *Hilary v. Walker*, 12 Ves. 239. *Morse v. Royal*, *ibid.* 355.

1779. If the plaintiff has any title at law, let him pursue it. But equity will not interpose against a fair possessor only because the plaintiff is afraid his title may fail at law. This is not like a bill to quiet possession, or prevent multiplicity of suits. If I should do otherwise, it would be torturing the titles of the subject.

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Supra 559,
765.

In *Medley v. Talmy* (cited), *Com. Rep.* 652., there had been only forty years' possession. In the present case there has been much longer possession, and there have been several intermediate conveyances to the defendant and those under whom he claims. In *Medley* and *Talmy's* case the defendant plainly could not make out any exemption at all; and the substance of the case is no more than that equity will not disturb a long possession; and the reporter's observations are certainly impertinent. In the cases of the

Supra 757. *Corporation of Bury v. Evans*, and the *Corporation of Warwick v.*

Supra 765. *Lucas*, the same point is in substance ruled: and as to the second point made there (a), I must much alter my opinion of the law, before I could concur in it, although, as it is not in judgment here, it is not necessary for me to say any thing upon that head. I take it for granted, that there was no deed of severance in that case. I renounce all concurrent jurisdiction with the courts of law, where the legal title only of tithes comes in question; but, where there is any equity mixed therewith, I agree, that this court will interpose.

I do not know (and I was taxed narrowly on the argument to find) if the two cases of *Medley* and *Talmy* and the *Corporation of Warwick* and *Lucas* had ever been decreed against, and I do not find they have. In *Evans* and *Bury Corporation* it was a mere legal question, and no equity was mixed with it. The case of

Supra 952. *Jennings v. Lettice* in the Exchequer is, according to my note of it, distinguishable from the present case. It would be the hardest thing in the world to dispossess a fair purchaser in equity, when the plaintiff thinks he cannot recover at law. Nay, even the rigour of the law in some cases construes with equity; as in cases of mortgages, and in actions on the case for accidental fire. Therefore, I think the plaintiff entitled to no relief in equity, and dismiss the bill with costs. (b)

(a) The point alluded to is in the case of the *Corporation of Bury v. Evans*, viz. "that a court of equity would decree against a long and pacific possession, if no probable discharge is alleged." 29 Car. 2. Dr. Reeves, dean of Windsor, exhibited his bill against Mr. Lection, to discover writings concerning some tithes in Wotton, parish of the corporation of the deanery; the defendant pleaded a fine levied, Hil. 13 Eliz., and a non-claim by the present dean, which was al-

lowed to be a good plea." Cited per Lord Northington. S. C. 1 Eden 301.

(b) See *Jennings v. Lettice*, supra 952. *Scott v. Airey*, infra 1174. *Strutt v. Baker*, 2 Ves. jun. 625. infra 1430. *Nagle v. Edwards*, 3 Anstr. 702. infra 1442. *Lord Petre v. Blencowe*, 3 Anstr. 945, infra 1484. *Berney v. Harvey*, 17 Ves. 119. infra. *Heathcote v. Aldridge*, 1 Mad. 236. infra. *Meade v. Norbury*, 2 Pri. 338. infra., affirmed in the House of Lords.

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The following case of Sawrey v. Collins, which came on by appeal from the court of Exchequer to the House of Lords on 10th Feb. 1772, and is to be found in 6 Br. P. C. 459., was likewise cited and relied upon in argument in the above case of Scott v. Airey.

BEFORE the act of parliament aftermentioned there was founded in the parish church of *Tamworth* a college or collegiate church, consisting of one dean, five prebendaries, and one lay vicar choral; and the dean and prebendaries were parsons of the whole parish of *Tamworth*.

By an act of parliament 1 *Edw. 6. c. 14.* all manner of colleges, free chapels, and chantries, being, or *in esse*, within five years next before the first day of that parliament (except such as are therein excepted), and all manors, lands, tenements, rents, tithes, pensions, portions, and other hereditaments belonging to them, were vested in possession in the king, his heirs and successors; and the king, his heirs and successors, were authorized to appoint commissioners under the great seal of *England*, which commissioners, or any two of them, were directed to make and ordain a vicar to have perpetuity for ever in every parish church, being a college, free chapel, or chantry, that should come to the king's hands by virtue of that act, and to endow every such vicar sufficiently, having respect to his cure and charge; the same endowment to be to every such vicar, and his successors for ever, without any other licence or grant of the king, the bishop, or other officer of the diocese. And the commissioners, or two of them, had authority to assign in every great town or parish, where they should think necessary to have more priests than one for ministering the sacraments within the same town and parish, lands and tenements belonging to any chantry, chapel, or stipendiary priest, to be to such person and persons as the commissioners should assign or appoint, to continue in succession for ever, for and towards the sufficient finding and maintenance of one or more priests within the same town or parish, as by the commissioners should be thought necessary or convenient.

S. C.
4 Bro.
P. C. 629.
(2d ed.)
3 Wood's
Decr. 181.
Scacc.
Where the right of patronage was in dispute, and two clerks had taken possession, the one of the parsonage-house and the other of the church, the latter performing the duties, a bill by the latter against the former for an account of monies received, &c. held to lie though the six months had elapsed. Wherever the question of right in a suit commenced in a court of equity is a mere legal question, the court does right in sending it to law to be tried upon a proper issue, though the whole of the evidence is written evidence, and the question

By virtue of this act, the collegiate church of *Tamworth* was dissolved, and the possessions belonging thereto, together with the parsonage of the said church and parish, came to the possession of king *Edw. 6.*; and he issued his commission to sir *Walter Mildmay* and *Robert Kelway* and others, who, in pursuance of the act, assigned a salary of 20*l.* a year to the vicar of *Tamworth*, and another salary of 16*l.* a year to two priests (*viz.* 8*l.* each) to assist the vicar of *Tamworth*. These salaries were to be paid out of the possessions of the said college; and a mansion-house, now called the college or vicarage-house, and a garden, in *Tamworth*, part of those

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depends
upon the
construc-
tion of such
evidence.

possessions, were assigned for the habitation of the vicar and as part of his endowment.

The said college and deanery, and the right of patronage of the church and vicarage, and the possessions of the college, (except the house and gardens allotted to the vicar) having descended to queen *Eliz.* in right of her crown, she, by letters patent, dated the 22d of *October* in the 23d year of her reign, granted to *Edmund Downing* and *Peter Aysheton* and their heirs for ever the said college, deanery, and prebends, and the advowson, donation, and right of patronage of the vicarage and church of *Tamworth*, and all tithes, great and small, in *Tamworth* aforesaid, subject to the several yearly reservations therein mentioned; and (amongst them) of the sum of 20*l.* payable yearly to the vicar of *Tamworth* for his stipend or salary, and 16*l.* for two curates there, for their salaries, payable by the receiver-general of the county, or at the receipt of the Exchequer, and if the grantees paid them, the queen covenanted to allow the same.

By indenture dated the 21st of *February* in the 25th year of the same reign, the said *Edmund Downing* and *Peter Aysheton* granted the said college, deanery, and prebends, and the advowson and right of patronage of the vicarage and church of *Tamworth*, to *John Morley* and *Roger Rant* in fee simple.

By another indenture, dated 10th of *May* in the said 25th year of queen *Elizabeth*, *Morley* and *Rant* granted the said deanery of *Tamworth*, or prebends of *Amington* and *Wiggington*, and the tithes thereto belonging, and the advowson and right of patronage of the vicarage and church of *Tamworth*, to *Thomas Repington*, esq., the ancestor of the respondent *Repington*, in fee simple.

Thomas Repington being thus seised of the premises, and particularly of the said advowson and right of patronage, did, by settlement, dated the 2d of *November* in the 1 *Ja.* 1., made on the marriage of *John Repington* his son with *Margaret Littleton*, covenant, that he and his heirs would stand seised of divers premises therein mentioned (of which the deanery and deanery-house in *Tamworth*, and the advowson and right of patronage of the vicarage and church, as belonging to and usually enjoyed with the deanery and deanery-house, were parcel), to the use of the said *John* and *Margaret*, and their heirs male, in special tail; with remainder to *Humphrey Repington*, his second son, in tail male, and with divers remainders over.

John Repington and *Margaret* his wife, having by means of the last-mentioned deed become seised of the premises comprised therein, he, by deed dated the 28th of *August* in the 7th year of king *James* 1., nominated and appointed *Samuel Hodgkinson* to be

vicar of *Tamworth* for his life, if he should so long exercise the place and preach there once every fortnight at least. This nomination was made on the resignation of the vicarage by *Roger Molde*, who had been the vicar from the 20th year of queen *Eliz.* by her grant and nomination.

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The said *John Repington* (then sir *John*) died in the year 1625, leaving sir *John Repington* his son and heir; and he, by indenture, dated the 12th of *November* 1629, did, upon the cession of the said *Samuel Hodgkinson*, nominate and appoint *Thomas Blake* to the said vicarage for his life, in manner aforesaid; and *Blake* held the same till his death.

The last-named sir *John Repington* died in the year 1662, leaving *Seabright Repington*, his only son; and he, on the death of *Blake*, by indenture, dated the 17th of *December* 1663, nominated and appointed *Samuel Langley* to the vicarage. *Langley* held it during his life; and upon his death, *Seabright Repington*, by indenture, dated the 19th of *June* 1694, nominated and appointed *Samuel Collins* to the said vicarage, and he held it till his death in the year 1710, and thereupon *Edward Repington* (the eldest son of *Seabright Repington*, who was then dead), by indenture dated the 8th of *January* 1710, nominated and appointed *George Antrobus* to the vicarage.

On the 2d of *January* 1715, the said *George Antrobus*, by the description of curate of *Tamworth*, made oath and declared before the commissioners appointed by the bishop for taking the clear improved yearly value of every parson, vicar, curate, &c. officiating in any church or chapel, that the maintenance of the curate of *Tamworth* did not arise yearly to above 16*l.* payable out of the Exchequer; and that the maintenance of the preacher did not arise yearly to above 20*l.* payable in the same manner; and thereupon, in pursuance of the act of the 1 *Geo.* 1., the bishop certified, that the contents of the said declaration were true.

The said *George Antrobus*, during his life, continued sole incumbent of the vicarage, and received not only the said salary of 20*l.* payable yearly to the vicar, but also the said salary of 16*l.* a year, or 8*l.* a year to each of the two priests or curates, under the denomination of the salary of the curate of *Tamworth*, with all other stipends and benefactions given from time to time to the ministers and curates of the church by several persons, after the dissolution of the college. And he, in right of the vicarage, held the mansion-house, garden, barn, and appurtenances, which had been assigned for the residence of the vicar, from the time he became vicar till his death in the year 1724. [1184]

On the death of *George Antrobus*, *Edward Repington*, by indenture dated the 29th of *December* 1724, nominated and appointed to

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the said vicarage *Robert Wilson*, who continued vicar till his death, which happened in the year 1758, and received during that time the said salaries of 20*l.* and 16*l.*, and all the other stipends and benefactions; and he likewise enjoyed the mansion-house, garden, barn, and appurtenances.

Edward Repington died in 1735, and on his death, *Edward Repington*, his nephew and heir at law, became seised in tail of the said advowson and right of patronage, and all the other premises, by virtue of the entail created by the deed of settlement before stated; and he, upon the death of the said *Robert Wilson*, by an instrument under his hand and seal, dated the 1st of *December* 1758, addressed to the bishop of *Litchfield* and *Coventry*, after reciting that the parish church of *Tamworth* with the perpetual curacy was then void by the said *Robert Wilson's* death, and that the same of right belonged to his nomination, did certify to the bishop, that he nominated the respondent *William Sawrey* to the said perpetual curacy, and he prayed the bishop to grant his licence to the respondent to officiate in the said church. This instrument was, on the 7th day of the same month of *December*, delivered to the bishop, but he did not think proper to grant such licence.

The last-named *Edward Repington* died, leaving *Charles Repington* his brother and heir, who, on his death, became seised of all the premises under the aforesaid entail; and *Edward Repington*, having in his lifetime made a will and appointed his said brother *Charles* executor of it, the latter, upon the death of his brother, proved his will, and became his personal representative.

[1185] The said *Charles Repington*, by indenture, dated the 5th of *May* 1759, reciting, among other things, that the vicarage or created vicarage of *Tamworth*, with the perpetual curacy of *Tamworth*, was become void by the said *Robert Wilson's* death, did give and grant to the respondent *William Sawrey* the said vicarage, together with the said curacy, and did nominate and appoint him to be vicar of the said vicarage, and curate of the said curacy for his life, upon the terms before mentioned. And by another indenture of the same date, reciting that the said church and curacy were void by the said *Wilson's* death, and that the same had become void in the lifetime of the last-named *Edward Repington*, and that he had made his will, and appointed the said *Charles Repington* sole executor, who had proved the same, and that it then belonged to him to make a donation and grant of the said church to a proper curate or clerk in *Wilson's* room; the said *Charles Repington* did give and grant the said parish church and curacy to the respondent *William Sawrey*.

On the 8th of *December* 1764, *Charles Repington* died, leaving the respondent, *Charles Edward Repington*, his eldest son and heir, an infant; and he, upon his father's death, became seised of the

advowson and right of patronage of the said church of *Tamworth*, under the aforesaid entail. 1779.

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Queen *Elizabeth*, by letters patent, dated the 10th of *October*, in the 30th year of her reign, reciting the commission granted by king *Edward 6.* to sir *Walter Mildmay* and *Robert Kelway*, and their proceedings under it, did grant, that from thenceforth there should be a grammar-school in *Tamworth*, and that the bailiffs of the town should be incorporated for ever by the name of "the guardians and governors of the grammar-school of *Elizabeth* queen of *England*, in *Tamworth*;" and she thereby granted, among other things, that the said guardians and governors, and the twenty-four capital burgesses for the time being, or the major part of them, might nominate, appoint, and admit a fit and learned preacher to serve in the church of *Tamworth*; and also two ministers or curates to serve therein for ever, as often as the same should be void, with the consent and allowance of the earl of *Essex*, or the heirs male of his body, or the under-steward of the earl, or his said heirs male, to such admission. And she thereby also granted to the said guardians and governors a stipend of 20*l.* a year, payable to the preacher serving in the said church for ever; and another stipend of 16*l.* a year, payable for ever to two ministers or curates serving in the church, by the hands of the receivers-general of the crown in the counties of *Stafford* and *Warwick*, in like manner as they were theretofore paid for such use. And she thereby granted to them all that her messuage with the appurtenances in *Tamworth*, and a garden wherein the late vicars of the college of *Tamworth* used to dwell; in which messuage the preacher and curates of the town are therein mentioned to have inhabited at the time of making the letters patent, to hold to them and their successors for ever, for the habitation of two ministers or curates serving there for ever. [1186]

King *Charles 2.*, by his letters patent, dated the 17th of *February* in the 16th year of his reign, made grants to the bailiffs of *Tamworth* similar to those contained in the last-mentioned letters patent of queen *Elizabeth*, and incorporated them in the same manner.

The respondents, the guardians and governors by, deed poll under their common seal dated the 1st of *December* 1758, by virtue as well of the letters patent of the 30th of queen *Elizabeth* as of the letters patent of king *Charles 2.*, with the consent and approbation of lord *Weymouth*, their high-steward, nominated, appointed, and admitted the appellant to serve in the said church, as minister and curate there, and gave and granted to him the offices of preacher, minister, and curate of the church, and all profits and stipends thereto belonging, to hold for his life; lord *Weymouth* signed an indorsement on the deed, testifying his consent; and the appellant, on

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the 9th of the same month, exhibited the deed to Mr. *Lowndes*, the auditor, and caused it to be enrolled with him.

The guardians and governors also, by another deed under their common seal dated the 5th of *January* 1759, addressed to the lord bishop of *Litchfield* and *Coventry*, reciting, that the church of *Tamworth* with the perpetual curacy was then void by the death of *Wilson*, and that the same of right belonged to their gift of nomination, certified that they thereby, with the consent of their high-steward, nominated the appellant to the perpetual curacy, with the stipends thereto belonging; and prayed his lordship to grant him a licence for the same. Lord *Weymouth* signed his consent, and the bishop granted the appellant a licence accordingly.

In *Easter* term 1759, *Charles Repington* sued out a *quare impedit* against the respondents, the guardians and governors, the twenty-four capital burgesses, and the appellant; and three several issues were tried thereon by a special jury, at the summer assizes for the county of *Stafford* in 1761, upon which trial all the issues were found for the plaintiff *Charles Repington*; whereupon the respondent *Sawrey* entered upon the duty of the said living, and took possession of the keys of the church, and officiated therein, and served the chapel belonging thereto. But the appellant *Collins* got possession of the vicar's house, and occupied the same, and received the salaries of 20*l.* per annum and 16*l.* per annum.

[1187] In *Michaelmas* term, 1761, the respondent *Sawrey* brought an ejectment in the court of Common Pleas, on his own demise, against the appellant, in order to recover the possession of the vicarage-house and garden; and the same came on to be tried at the summer assizes in 1763, for the county of *Warwick*; and upon the trial, the appellant's counsel insisted, that the respondent ought to prove either admission and institution, or a licence from the bishop; but the respondent not being prepared to prove a licence, a verdict was found for the appellant. However, in *Easter* term, 1763, the judgment upon the verdict in 1761 was arrested, by reason of a mistake in the pleadings.

In *Michaelmas* term, 1763, the respondent *William Sawrey* exhibited his bill in the court of Exchequer against the appellant, the respondents, the guardians and governors, *Frederick*, lord bishop of *Litchfield* and *Coventry*, and the said *Charles Repington*; praying, that the appellant might be decreed to come to an account with him for all sums of money, stipends, rents, surplice fees, and other perquisites due and usually paid to the vicars of the said church, which had been received by him, or any one to his use, from the time the respondent *Sawrey* was nominated vicar; and also for the rents and profits of the vicarage-house, and all other the lands and

estates belonging to the vicar, received by the appellant, or paid to his use, and might be decreed to pay to the respondent *Sawrey* what should appear due on the balance of such accounts; and that the appellant might also be decreed to deliver up to him the possession of the said house and lands, and that he might be quieted in the possession thereof; and that the appellant might deliver up to the said respondent the parish registers, and all other papers in his custody relating to the church and parish, and usually kept by the vicar: and that in case the respondents, the guardians and governors, and the appellant and the bishop, or any of them, should pretend any right or title to the advowson, donation, or right of patronage to the vicarage or curacy, or in case any doubt should arise touching the nature of the incumbency of the church, or whether the same was a donative vicarage, or a perpetual curacy, or in whom the right of patronage, donation, nomination, presentation, or appointment of the vicar, preacher, minister, curate or curates of the church was then vested, and to whom the same did then of right belong; then that such right, and the several matters aforesaid, might be tried in one or more proper issues, to be directed by the court. And that the bishop might be decreed, if the same should appear necessary, [1188] to grant the respondent *Sawrey* licence to preach in the church, or admit him to the same; and in case he had granted any licence to the appellant, that he might be decreed to recal it.

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The appellant *Collins* put in a demurrer to part of this bill, and for cause of demurrer said, that the plaintiff's pretended right to the several accounts prayed by the bill and the payment thereof, and the rents and profits, and possession of the vicarage-house and lands, was merely a right subsisting at law, and only and properly triable by a jury, and to be determined by the common law.

This demurrer on argument was over-ruled by the court, on the 10th of *December* 1764, and soon afterwards the respondents, the guardians and governors, and the 24 capital burgesses, put in a plea and answer; and by their plea insisted, that the plaintiff's right, if any he had, to the said church and cure, was a matter triable at law; but on arguing this plea, it was over-ruled on the 25th of *February* 1767: from which orders, neither *Collins* nor the corporation thought proper to appeal, but afterwards put in their respective answers to the bill, and thereby insisted, that upon the construction of the several grants of the crown under which the *Repington* family and the corporation respectively claimed the right of nomination, such right belonged to the corporation; and the appellant *Collins* hoped, that his right, under their nomination, would be established.

Pending the suit *Charles Repington* died, and was succeeded in his estates by the respondent, *Charles Edward Repington*; against whom the proceedings were duly revived.

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The cause being at issue, came on to be heard before the barons in *June* 1768; and they having taken time to consider, did, on the 24th of *November* following, order and decree, that it should be referred to a trial to be had between the parties at law, in a feigned action, to be for that purpose brought in the office of pleas of that court, to try the several issues following: 1st, Whether *Charles Repington*, brother and heir at law of *Edward Repington*, or any person claiming by, from, or under them, or either of them, was before, and on the 5th day of *May* 1759, seised of or entitled unto the advowson of the vicarage and church of *Tamworth*? 2d, Whether the respondent *William Sawrey* was before and at the time of exhibiting his bill in the cause lawfully appointed vicar of *Tamworth*? 3d, Whether the same respondent was entitled to the house formerly belonging to the vicars choral of *Tamworth*? And 4th, Whether the same respondent was entitled to the stipends or salaries [1189] of 20*l.*, 8*l.*, and 8*l.* of the curates of *Tamworth*, or any or either and which of them; and the usual directions were given concerning such trial.

From this decree the appellant appealed to the House of Lords; and on his behalf it was argued, that the ancient law had so much regard to plenarty and to the peace of the church, that if the clerk of a usurper was admitted, the rightful patron lost his turn of presenting for that vacancy: but the statute of *Westminster* 2d gave the action of *quare impedit*, provided it be brought within six months after the church becomes vacant. That in the present case, Mr. *Repington*, the patron, had availed himself of that action, and it had been determined against him. It was immaterial on what point it was so determined, because the determination was conclusive. But, if after the six months elapsed, and after the patron had failed in his suit, and was precluded from commencing any other, his clerk might prefer his bill in a court of equity, praying issues to be directed to try a right which was merely legal, and for an account of the profits of a benefice, which the incumbent who had been duly instituted had a legal right to retain; the policy of the law, in giving the action of *quare impedit*, and in limiting the time in which it should be brought, and the damages to be recovered by it, would be entirely defeated: and upon this ground it was apprehended, that the court of Exchequer, as a court of equity, ought not to have retained the respondent *Sawrey's* suit, but his bill should have been dismissed.

Supposing, however, that the subject matter of the bill was properly within the jurisdiction of the court, and that the respondent *Sawrey* was entitled to every part of the relief prayed by his bill; yet the order directing these issues was conceived to be very improper: for the questions to be tried by them depended upon written

evidence which was before the court; and principally upon the construction and effect of the grant to *Downing* and *Aysheton*: and therefore the court ought not to have directed issues to be tried before a single judge, by a jury at an assize, but should themselves have determined the cause; as the evidence, to which both parties referred themselves, was fully before them.

On the other side it was contended, that the court of Exchequer, as a court of equity, had a jurisdiction to entertain the suit; the relief prayed being an account of profits received by the appellant, and for a delivery of the parish registers and other muniments belonging to the church; all which were heads of relief proper for a court of equity. The bill also prayed, that the bishop might recal his licence to the appellant, and grant one to the respondent *Sawrey*; which it was presumed the bishop would think fit to do when the right was determined. And as the relief depended upon the question of right, the bill therefore further prayed, that issues at law might be directed to determine the right, as incidental to the relief prayed: and the question upon the right being a legal question, the court had directed such issues as would effectually decide it, and be a foundation for granting the relief prayed by the bill. As to the objection, that the right being a matter merely triable at law, a court of equity ought not to have entertained the bill; it had already been determined and over-ruled both upon the plea and the demurrer; and therefore to persist in it any farther was vexatious. The relief prayed was such as a court of equity alone could decree; and therefore the bill ought not to have been dismissed: and the question of right being a legal question, the court did well in sending it to law to be tried, reserving the consideration, whether they should relieve the party or not, till the event of the trial should be known.

After hearing counsel on this appeal, it was ordered and adjudged, that the same should be dismissed; and the decree therein complained of affirmed.

Tr. 19 Geo. III. A. D. 1779. Scac.

Evans and Shaddock v. Green. [MS.]

THIS was a bill by the lessees of the vicar of *Fulham* against a gardener for subtraction of tithes. The plaintiffs received a notice from the defendant. that he should set out his tithes every day except *Sundays*, as they became fit to be gathered for the market. The defendant in consequence of this, under colour of setting out the tithes fairly, it was alleged, studiously threw out the refuse of his garden, and otherwise conducted himself in a fraudulent manner to the prejudice of the plaintiffs. It was insisted by the plaintiffs'

1779.

Sawrey
v.
Collins.

[1190]

S. C.
3 Wood's
Decr. 119.
Where the
witnesses
for the
plaintiff
stated par-
ticular
instances of
fraud in
setting out

1775.

Evans
v.
Green.

tithes, and
the wit-
nesses for
the defend-
ant met
these

[1191] charges by
general
allegations
of fairness,
the court
directed an
issue, the
subject of
which (the
fairness)
was limited
to the pe-
riod of two
months.

counsel, that the evidence was so full, so clear, and so circumstantial, as to render the case too clear to need the interposition of a jury: seventeen witnesses must be perjured, if the merits were not with the plaintiffs: that no such consequence could follow on the other side, as there was only some general swearing by some servants, that when the fruits were gathered the tithes were fairly set out: that if there were any doubt, they admitted an issue would be necessary; but that here there was no doubt at all.

Eyre B.—The single question is, whether the tithes have been fairly set out. It is admitted the plaintiffs have given very forcible and weighty evidence, and that pointing to particular facts. On the other side, there is a general evidence which goes to a general contradiction or denial of the particular evidence on the part of the plaintiffs. The substance of all the evidence on both sides is this: ten or eleven witnesses speak to particular instances of not fairly setting out the tithes, particularizing the manner, &c. This evidence unanswered would indeed be clear proof of subtraction of tithes. But the defendant's witnesses say, that in no case within their observation (and they have had constant opportunity of observing) was there any unfairness, but that the tithes were fairly taken promiscuously; that they were not of inferior value, nor were there any improper attempts to conceal, &c. Now these assertions cannot be true, if the plaintiffs' instances are true. This therefore is positive as much as the plaintiffs' evidence, though not equally satisfactory. The question therefore is, Whether the court ought to decide upon this evidence, or to send it to a jury? If they are bound to decide, there is little doubt in favour of the plaintiffs, because their evidence is particular and strong; and if the witnesses have not spoken the truth, they are liable to be indicted for perjury.

On the other side, the evidence is more general, and less open to perjury. But there is a further difficulty—the plaintiffs' bill on the ground of fraud states generally inferior value, secreting, unseasonable hours, &c. On this there is an issue and proof. The plaintiffs prove in the interrogatories the general allegations by particular facts. The defendant cannot encounter this evidence but in a general way, not knowing before-hand the particular facts. If therefore the court were to give to the plaintiff credit as to proof of particular evidence, it seems as if it would not do justice to the defendant. If then the intervention of a jury be necessary, what is to be done? The difficulties of an action will be great, as to the length of time, the minuteness of the articles, &c. The court ought therefore (if possible) to prevent these difficulties, and the mode seems easy. It may be by confining the period to two or three months, and letting the rest abide that, because by the whole case

it seems as if the course of setting out the tithes during the whole time were the same. Let the issue therefore be whether fairly set out during the months of *October* and *November*.

Hotham and *Perryn* B. concurred.

The defendants accordingly brought their action on the plea side of the court against the defendant on the statute. [1192]

And the causes came on to be tried before the Lord Chief Baron *Skynner*; when all matters in difference were, by consent, referred to the award of *Michael Impey* esq. who was also to settle what should be paid in future by the defendant as a composition for the said tithes; and on the 12th of *September* 1780, the said *M. Impey* made his award in favour of the defendant, with costs of suit; and certified, that he had settled that the sum of 3*l.* 11*s.* was a fair and adequate composition to be paid by the defendant for the said tithes.

H. 20 Geo. III. A.D. 1780. Scac.

Twells v. *Welby*. [MS.]

In this case the court ordered, by consent, two issues to try,

First, “ Whether the occupiers for the time being of so much meadow and pasture land, part of the lands called or known by the name of *the Old Inclosure*, as lies or is situate within the parish and chapelry of *East Allington* in the county of *Lincoln*, have, from time immemorial, constantly paid and been accustomed and of right ought to pay yearly to the rector for the time being of the mediety of *Sedgbrook*, with the parish and chapelry of *East Allington* annexed, the sum of twelpence, and no more, for every acre of the said meadow and pasture land when used as such, and so in proportion for any less quantity than an acre; and whether the said rector for the time being hath accepted the same, as a *modus* for and in lieu and satisfaction of all manner of tithes whatsoever yearly arising, renewing, or payable upon or from the said meadow and pasture land when used as such?”

Secondly, “ Whether the occupiers for the time being of such meadow and pasture land, part of the said lands called or known by the name of *the Old Inclosure*, as lies or is situate within the parish of *West Allington* in the county of *Lincoln*, have, from time immemorial, constantly paid, and been accustomed, and of right ought to pay yearly to the rector for the time being of the said parish of *West Allington*, the sum of twelpence, and no more, for every acre of the last mentioned meadow and pasture land, when used as such, and so in proportion for any less quantity than an acre; and whether the rector for the time being hath accepted the same as a *modus* for and in lieu and satisfaction of all manner of tithes whatso-

S. C.
4 Wood's
Decr. 132.
Where the
facts and
previous
proceedings
are stated.
The rank-
ness of a
modus is a
question of
fact, not of
law, and
can be de-
termined
only by a
jury.

[1193]

1780.

Twells
v.
Walby.

ever yearly arising, renewing, or payable upon or from the last mentioned meadow and pasture land when used as such?"

The defendants in equity to be plaintiffs at law.

The issues were tried by a special jury of the county of *Lincoln*, and were both found in favour of the occupiers; but Mr. Justice *Buller*, who tried the cause, indorsed the *postea* in the following words: "The land in question was proved to be now worth sixteen shillings an acre on an average, and that thirty yeas ago it was worth only twelve shillings an acre on an average. If the court should be of opinion that upon this evidence the *modus* is rank, then a verdict is to be entered for the defendant." *F. Buller*.

Upon the cause coming on for further directions, *Newnham, Burton, Wheeler, Balguy*, and *Sutton*, for the plaintiff in equity, who was the defendant at law, contended, that a case of this kind may exist where a court would not send to a jury upon a mere question of fact; that there was sufficient in the present case to maintain the indorsement; that a *modus* for a particular thing may be rank in one place, and not so in another; that rankness was a very old objection; for *moduses* being founded upon contract, it was competent to the court to inquire into the reasonableness of the foundation. They admitted that modern cases had left rankness to be considered on the trial of the issue, but they did not know that it had ever been determined, that, whether a *modus* or a temporary composition was a question of fact; that it did not appear what was the ground of the decision upon the re-hearing in the case of *Grasscombe v. Jefferies*, referred to by lord *Hardwicke* in *Chapman v. Smith*; nor is it known what was the final event of that case; that a *modus* was like other customs, and might be overturned by internal evidence; that in the question to the court of Common Pleas in *Pyke v. Dowling*, it was assumed, that the *modus* had been paid time out of mind; and therefore rankness could be no objection in that case. They said, that perhaps it was not necessary to contend whether rankness was a mere question of law; that admitting it to be a question of fact, it was a fact to be decided, not by a jury, but by the general antiquary knowledge possessed by the court; that it depended upon the comparative value of land and money in former days; that the facts found fully warranted a conclusion in favour of the plaintiff in equity; that from the evidence in the cause a shilling must have been adequate to the whole value in the time of *Richard the first*. They cited the cases of *Benson v. Olive*, and *Ekin v. Pigot*, in which last case lord *Hardwicke* over-ruled a farm *modus* for rankness.

[1194]

Supra 701.

Supra 783.

Hill Serjeant, for the defendant in equity said, that he would not contend but that the court may decide upon a *modus* where it is evidently rank; but that if any supposition will save it, it ought to be

1780.

Twells
v.
Welby.

Supra 601

Supra 708.

Supra 857.

Supra 806.

[1195]

made; that the *modus* in this case was not larger than many which had been allowed; that if so, it was not necessarily rank; that the existence of the *modus* was the point in issue; that the value found might tend to disprove its existence, but that if its existence was found, rankness could be no objection; that here the existence was found: that nothing else was found, for the indorsement was the judge's. In *Pole v. Gardiner*, it was objected to *moduses* of 12*d.* an acre for low meadows, and 8*d.* an acre for high meadows, in lieu of tithe of hay, that they were rank; that they could be only temporary, by reason of their largeness; that the hay of a whole acre was anciently not worth the amount of the tithe at that rate. However, upon the appeal to the House of Lords issues were directed. And there the appellants say there is no rule of law to limit the value of *moduses*; that they were all originally contracts or compositions real; and the owner might endow with more than the real value; and a farthing an acre would be too much on a rigid adherence to value in the time of *Richard* the first. It appears from *Vin. Abr. tit. Dismes, D. a. pl. 47.* that the decree of the court of Exchequer in this case was reversed, according to lord *Harcourt's MS. tables, because churches might have been endowed with more than the value of the tithes.* In the case of *Giffard v. Webb*, there was a decree against the rector of *Stoke* in *Surry* for a *modus* of 3*d.* for a lamb; which decree was affirmed upon an appeal to the House of Lords. He said, that the notion of rankness being sufficient to enable the court to determine upon a *modus* was first taken up by Lord Chief Baron *Ward*; that *Pole v. Gardiner* was in his time; that the notion was not warranted by antiquity, and it was condemned almost as soon as it prevailed. The value of lands at different periods was exceedingly uncertain: it varied from the accidents of inclosure, depopulation, &c. and no certain conclusion could be drawn from the present value; in *Chapman v. Smith*, lord *Hardwicke* mentions the case of *Grasscombe* and *Jefferies*, where a *modus* of 12*d.* an acre was sent to a trial. In the case of *Sansom v. Shaw*, *Mich. 1748*, in C. P. on a motion in arrest of judgment in prohibition upon a *modus* of 10*d.* an acre payable by all but towners for pasture and meadow ground, two objections were taken; 1st, That the *modus* was rank, and therefore could not have been before time of memory; 2d, That it was uncertain in excluding towners. *Belfield* shewed cause, and said that lord C. B. *Ward* first introduced the doctrine of rankness. Lord C. J. *Willes* said he could not comprehend the ground of it; that it was not likely the owners would pay more than the value of the tithes; but that we were to go not upon presumptions but proof; that the time of *R. 6.* is as immemorial now as the time of *R. 1.* was at the time

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v.
Welby.

of the statute of *West. 1. (a)*. *Littleton* states two opinions with respect to prescription; the last was probably his own. In 2 *Ro. Abr.* 269. pl. 16. lord *Rolle* states it as his opinion, that the time of memory at this day should be limited to sixty years; but he admits the practice to be different.

Cust on the same side argued, that the case of rankness was not now before the court upon this indorsement; that it never could be brought before the court after verdict; that the first case of rankness was *Grasscombe v. Jefferies*, 17th November 1687, on this *modus*; lord *Hardwicke* had a note of it from Mr. *Ward*; the *modus* was at first holden to be rank, but that decree was reversed on a re-hearing; that the next case in which rankness was brought forward was that of *Pole v. Gardiner*; that that was in queen *Anne's* time, just after *Sacheverell's* trial, when the cry "The church is in danger" was up; that in the year 1729 the case of *Chapman v. Monson* was determined, when the Lord Chancellour and two judges established a *modus* of 4d. an acre; that the *modus* in *Chapman v. Smith* was established after a trial at law; that in *Giffard v. Webb*, the court went upon the case of *Pole v. Gardiner*, and directed an issue, which direction was affirmed by the House of Lords. He said, that he was of counsel in the case of *Sansom v. Shaw*, when it was tried at *Lincoln* assizes before lord C. B. *Parker*; that they had a rule to be at liberty to move for a new trial if they did not succeed in the motion in arrest of judgment; but they never did move for a new trial; that in that case the largeness of the *modus* was holden to be nothing else than a mere circumstance: that it was evidence to a jury; and lord C. J. *Willes* said they do not carry it farther than 60 years, because of the statute of *Elix.* In the case of *Richards v. Evans*, 1 *Ves.* lord *Hardwicke* takes a distinction between a case on the value of lands, and one on the value of specifick things; that history settles the one though not the other; that it was exceedingly difficult to ascertain the value of lands at a distant period. He said that the question to be tried in the present case was not, whether a composition before the 13th of *Elix.* is reasonable, but whether it existed. In considering these compositions, he said, all idea of bounty was not to be excluded; that it might be a beneficial bargain in prospect of future advantage, though half the lands of the parish were given; that the case of *Pyke v. Dowling* was undistinguishable from the present case, upon the point of that being concluded by the verdict; that the present case supposed the fact of the existence of the *modus*; that the defendant at law called no witnesses to disprove it; that the court therefore could not say that

Supra 802.

[1196]

(a) In *O'Connor v. Cook*, 6 *Ves.* 665. the Lord Chancellor made some strong observations on the last cited case, as did Sir *Tho. Plumer*, M.R. in *Short v. Lee*, 2 *Jac. & Walk.* 497.; so that its authority may be considered as much shaken.

the fact so found is not true. The only question referred to them is, whether upon the fact proved of the value of the lands the verdict is wrong; a question which the fact found of the existence of the *modus* does away.

1780.

Twells
v.
Welby.

Lord C.B.—Courts of equity deciding upon facts and law often decide on the fact appearing in evidence before them; and in questions of *modus* on bills for account of tithes, have frequently formed their opinion on the internal evidence of the *moduses*, and have decreed accordingly. But in one like the present they have often sent it to a jury to try whether immemorial or not. It is of necessity that the jury must decide and draw their conclusion from all the facts; and therefore, on the present occasion, it was the province of the jury to draw the conclusion. The question then is, Have they so done? It is said they have, for the finding is, that the occupiers for the time being of the meadow and pasture land in the declaration mentioned, have, from time immemorial, constantly paid, &c. And to be sure, if they have satisfactorily decided the question, this court can make a decree upon their finding. But it appears most manifestly from the indorsement, that the judge conceived the inference to be drawn was an inference of law and not of fact. If so, it was impossible that the jury should be informed by the judge, or apprized that it was their business to draw the conclusion of fact. Satisfaction therefore has not been had by this trial, and satisfaction must be had before we can make a decree.

Eyre B.—The issue was directed for the satisfaction of the court. The indorsement cannot be rejected, because made according to the directions of the judge; and if read, it proves his opinion that rankness was matter of law arising on the fact proved. The first question then is, Is it matter of law? Certainly not, as now settled, as well as from the reason of the thing. Second, If it be matter of fact only, Can the court make a conclusion of law where no conclusion of law arises! Certainly not. And it is equally impossible to decide on the facts as found. It is said, that if it be to be considered as a motion for a new trial, we must have the report of the judge before whom the issue was tried; but that is not necessary here, because it is sufficiently certified by the indorsement. No satisfactory trial has been had in this case, because a matter of fact has been taken for a matter of law. It is not enough to say the matter was talked of before the jury, and that they might have decided upon all the grounds; they ought to have had it put to them as a part of their duty.

The other barons concurred, and a new trial was directed, upon which a verdict was found for the defendants, the rectors. (a)

(a) See *O'Connor v. Cook*, 6 Ves. 665. *infra.*, where the authorities as to the *modus* of 12s. an acre are much discussed.

1780.

H. 20 Geo. III. A.D. 1780. Scac.

Hutchins
v.*Hutchins v. Maughan.* [MS.]*Maughan.*

S. C.

4 Wood's

Decr. 143.

Newly in-
closed lands
which will
not produce
crops by the
ordinary
means of
culture are
entitled to
exemption
for seven
years under
the statute
2 & 3 E. 6.

THE plaintiffs, trustees under the will of *Nathaniel* late Lord *Crewe*, Baron of *Stean*, and Lord Bishop of *Durham*, deceased, stated that they had been for six years past seised in fee of all the tithes, great and small, arising in the chapelry of *Shotley* in the county of *Northumberland*; that the defendants for three years past had occupied therein land, which was part of a piece of ground called *Balbeck Common*; that they had respectively growing thereon oats, rye, barley, peas, and turnips, which they had reaped, pulled, and carried away without setting out or paying the tithes thereof. The bill therefore prayed an account and payment.

[1198] The defendants admitted that the plaintiffs were owners of the tithes of corn, grain, and other predial and small tithes arising in the parish of *Shotley*, except such hay-tithes or *moduses* in lieu thereof, and small tithes, as the curates of the perpetual curacy of *Shotley* were entitled to; that they had in the said years severally occupied land in the said chapelry, part of a certain moor, common, or tract of waste land within or parcel of the manor of *Balbeck*, called *Balbeck Common*, from which they had reaped and carried away corn, grain, peas, turnips, and meslin, without setting out or paying to the plaintiffs the tithes thereof; for that, by 5 G. 3. for dividing and inclosing *Balbeck Common*, or the said tract of waste land in the barony or manor of *Balbeck*; and by the 2 & 3 Edw. 6. c. 13. the several parcels of land so occupied by them respectively were exempted from the payment of tithes for seven years after the improvement thereof.

The witnesses, whose depositions were read on the part of the plaintiff, deposed that *Balbeck Common* was not naturally barren and unfruitful; that it was rendered fit and proper for tillage by the ordinary course of husbandry used in moor lands, that is, by paring, burning, and liming; that following this course, and adding two, three, or four fothers to an acre, the land had produced tolerably good crops; that after the first crop had been raised, no other expence or extraordinary labour had been employed than was required in lands in general; that the crops of some of the occupiers had been equal to the crops on some adjoining ancient improved lands; that the produce of one crop would not repay the expences of cultivation, but that the produce of three crops would reimburse all expences whatsoever, and something more.

On the part of the defendants, the deposition of one *Cuthbert Robinson* was read, which stated, that he, the witness, had been accustomed to husbandry from his infancy, and was well skilled in land. That no considerable part of the common would or ever did grow

or produce a valuable crop of corn, grain, or other fruits by the ordinary means of culture used in the country with respect to fertile and improvable grounds upon their being converted from grass to arable lands; but that it would be absolutely necessary in order to obtain a crop of corn, &c. of any considerable value, to pare, burn, and lime or manure, or to pare, burn, and dung or soil the same in an extraordinary manner and at a very extraordinary expence: that seven years ago *Swinburne*, one of the occupiers, ploughed seven acres of the best ground in his allotment of *Balbeck Common* and winter-fallowed it; after cross-ploughed it and harrowed it, and then gathered up and burnt the clods or turves upon the ground; then sowed it with oats: that the crop produced was exceedingly bad, and in his judgement would hardly pay the expence of reaping: that a great part of the oats was so thin and short, that it could not be cut, and was therefore left on the ground: that in the last spring *Hopper*, another occupier, pared about thirty-eight acres, and sowed rape-seed on eighteen acres, and set turnips on twenty acres: that he did not lime or manure them: that the crops were exceedingly bad, though the season was remarkably good: that he almost daily viewed them; and that the rape was not of more value than twenty shillings.

1780.

Hutchins
v.
Maughan.

[1199]

Upon this evidence the court ordered the bill to be retained until *Michaelmas* term, with liberty to the plaintiffs in the mean time to bring an action upon the statute of 2 & 3 *E. 6.* against all the defendants for the recovery of the tithes demanded by the bill; the plaintiffs in such action to state all the lands to be in the joint occupation of the defendants, and the defendants to admit the same, and also the title of the plaintiffs to the tithes, and to insist on the benefit of the statute only.

A verdict was found for the defendants, and upon the cause coming again on 7th *February* 1782, the court ordered the bill to be dismissed with costs both at law and in equity. (a)

Tr. 20 Geo. III. A.D. 1780. Scac.

Jones v. Snow. [MS.]

LORD C. B. — This is a bill by the rector of *Shipston upon Stour* with the chapel or parish of *Tidmington* in the county of *Worcester* annexed for an account of all tithes. Tithable matters are admitted on the other side, but the defence insisted upon is, an exemption by virtue of an agreement between a predecessor of the

S.C.
4 Wood's
Decr. 143.
A decree in
equity con-
firming an
agreement

(a) See also *Jones v. Le David*, *infra* 1336. 2 M. & S. 349. *infra*. *Lord Selsea v. Powell*, *Stockwell v. Terry*, 1 Ves. 115. *supra* 823. *Byron v. Lamb*, *infra* 1594. *Warwick v. Collins*, 465. *Doyley v. Hornby*, *supra* 714. 6 Taunt. 297. *Kingsmill v. Billingley*, 3 Pri.

1780.

Jones

v.

Snow.

for the acceptance of land in lieu of tithes is not binding on the succeeding incumbent, though sanctioned by the concurrence of all parties interested. See *Cartwright v. Colton*, P. 19 G. 3. 4 Wood's Decr. 88. S. P. * *Supra* 914. reported also 2 Eden 304.

[1200]

plaintiff and the parishioners, confirmed by a decree in Chancery. The agreement, which was in 1652, was for the division of common fields in *Tidmington*, in which a part was to be given in lieu of glebe. A bill was filed by the lord of the manor to carry it into execution, stating the rector's claim, and his requisition of a money payment in lieu of tithes. The decree was made by consent of all parties. In answer it has been said shortly and cogently that in the *Attorney General and Blair v. Cholmley*, *Ambl.* 510. * Lord *Northington* determined, that such a decree was not conclusive upon the rector, and that decree was confirmed upon appeal. Thus the law is settled. But it has been insisted, that the present case differs from the case cited. One point of difference insisted upon is, acquiescence. But that has no weight; nor does any acquiescence appear after the plaintiff knew his right. Again, it has been said, that Lord *Northington* would not have so decreed, if allowance had been made for increased value, and here such allowance has been made. But there is no evidence of this. Again, it has been insisted, that an act of 6 G. 1. has operated as a virtual confirmation of the agreement. (a) But that act, upon examination, appears to have no such effect. If, therefore, there is no difference between this case and that of the *Attorney General and Cholmley*, the decree must be the same; but we give no costs, after so long an acquiescence.

Tr. 20 Geo. III. A. D. 1780. Scac.

Hutchins v. Full and others. [MS.]

S. C. 4 Wood's Decr. 155. Rayn. 915. 7 Bro. P. C. 78. (2d edit.) A custom to set out the tenth meal of the milk of each of the cows, as such cows came to the pail or first came in milk, and the tenth

THE plaintiff, as rector of *Dittisham* in the county of *Devon*, filed his bill against the defendants, stating that they, the defendants, had respectively had large quantities of milk from their cows in the said parish; and that he, the plaintiff, was entitled to the tithes of the whole herd of cows belonging to the said defendants respectively; and that the said defendants had neglected to set out the said tithe of milk fairly and legally, or to make any satisfaction for the same, and therefore praying an account thereof.

The defendants, by their answers, admitted the plaintiff's institution and induction, and that they had respectively kept several cows, from which they had respectively large quantities of milk, and that they had constantly set out fairly the tithe of the said milk, in the manner therein set forth and stated, and which is as follows,

(a) By this stat. the rectory of *Tredington* was divided into three parts. 1. *Shipston* and *Tidmington*. 2. *Shipston cum Capellâ de Tidmington*. 3. *Tredington* — previous to the year 1652. The rector of *Shipston cum Capellâ*, and two portions of the rectory of *Tidmington* was entitled

to tithes of all lands in *Tidmington*. In the said year R. W. lord of the manor, and the owners of the land, agreed for the said composition in 1654; suit by R. W. against the rector to establish the same, and in 1656 a decree for confirming the same. 4 Wood's Decr. 154.

viz. "by setting out the tenth meal of the milk of each of the cows kept by the defendants, as such cows came to the pail, or first came in milk, and the tenth meal together of all such cows as happened to come in milk on the same day; which method is, as they alleged, agreeable to the custom immemorially used in *Dittisham*, in setting out the tithe of milk, as they had heard and believed; and which custom they presume to be a fair, just, and reasonable one; as thereby the plaintiff would have the tenth meal of milk of each cow of some mornings and some evenings throughout the parish, as the cows came in milk, and thereby the defendants would also daily have milk for rearing of calves, and for the use of their respective families, which would not be the case if they were to set out the whole of their milk every tenth day, or the tenth meal of each of their respective herds of cows at once," wherefore they insisted, that such custom should be established, and that the defendants should not be decreed to account for the tithes of their milk.

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Hutchins
v.
Full.

meal together of all such cows as happened to come in milk the same day void.

[1201]

To which answers the plaintiff replied, and a commission issued for examining witnesses on the part of the defendants only, and they gave evidence in support of their answers.

The cause came on to be heard, when after full debate the court held the custom to be an unreasonable custom, because liable to an easy fraud, and therefore void. They at the same time declared, that both the court of Exchequer and the House of Lords had determined the case of *Bosworth v. Limbrick* upon this principle, that no other method of tithing would secure to the parson the full tenth of the produce.

Supra 1101.

An account was therefore decreed with costs.

From this decree the defendants appealed to the House of Lords, alleging the following reasons:

1. Customs of setting out all tithes have almost constantly resulted from experience of mutual advantage to the owners of the tithe and occupiers of the tithable property; and particular circumstances of the extent of situation, &c. &c. will make those customs which are upon that principle of mutual advantage reasonable in one parish, unreasonable in another; and it is therefore almost impossible for those who live at a distance from those parishes, and are not apprized accurately of these circumstances, to exercise a fair judgment upon the legality or illegality of the local custom. For which reason it appears to be necessary in all cases where the legality of a custom is disputed in courts of Equity, that an issue at law should be directed, and the fact ascertained by a verdict in the county which is the scene of the dispute. With a view to this principle, ecclesiastical courts have been, from the earliest periods of our law, restrained by prohibitions to their proceeding when customs or *moduses* are in dispute, their trials not being by juries. Such being

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v.
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the known practice of the common law courts, in their control over the ecclesiastical courts (the practice in which and courts of Equity is very similar) courts of Equity should impose a similar control upon themselves.

[1202]

2. Courts of Equity have decreed against customs to pay less than a tenth part in kind, as unreasonable, being only a part of the tithe in lieu of the whole. In this present instance no such custom is averred; the appellants set out in their answers a custom of paying a tenth part; they have given evidence of such custom and of the fact, that they punctually observed it in a fair and just manner; there was no evidence to the contrary, nor were any circumstances of fraud alleged on the part of the respondent, which he would not have omitted, had there been any foundation for such a charge.

3. The tenth part of almost every species is due by law *toties quoties* as it may arise; nor can a doubt be entertained but that as milk daily renewed, the tenth part of each day's produce, if not of each meal, was originally due for tithes. But mutual ease and convenience in different parishes have established a variety of customs in setting out the tithes of milk, and of *modus* in lieu of them: in many parishes every tenth morning's meal for a certain portion of the year, and every tenth evening's meal for the remainder of it, is the custom: in others, every tenth meal; in some, a certain quantity of cheese; and in others, a very small sum has been taken in lieu of the tithes of milk. In the present case every tenth meal of each cow is the custom computed from the time she comes in milk, which is a determinate period from the birth of her calf; so that no fraud can be put in practice, to put all the tithe-milk into an evening's meal, but the same is duly set out mornings and evenings; and nothing appears in the present instance, but that as many meals of milk were set out in the mornings as in the evenings. The present instance seems to be supported by the constitution of archbishop *Winchelsea*, that "the tithe of milk shall be paid from the time of its first renewing," &c. *Linwood* 199. The renewal of milk is certainly from the usual time of milking after a cow has had a calf, and this custom is what the appellants claim, and what they have punctually observed. It is a custom founded not only on this constitution, but on mutual convenience to the respondent and the appellants, the parish lying within very narrow limits, and the several farm houses in it lying at a distance extremely convenient for the tithe-gatherers to collect the tithe-milk from all of them. From this custom, therefore, the respondent and appellants derive mutual benefit, each receiving a daily constant supply of so necessary an article as milk; and it occasions less trouble to the respondent to send round every day after

his tithe-milk, than for the generality of farmers to tend and milk their cows. And as to throwing away the milk at the next milking season after setting it out, where the vessels are wanted, it is a custom well known to be warranted by judicial determinations.

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4. The present decree, it is supposed, was founded on the recent case of *Dr. Bosworth* and *John Limbrick*, but it is contended is not in any respect similar to this: in that case no particular custom was claimed or proved; in this, a custom is the subject in dispute, and has been proved: in that case many circumstances of deceit and unfair practice were evident; in this, not a circumstance of that kind appears: in that case it was proved, that a full tenth part was not set out; in this, proof has been given, that a full tenth has been set out. There is no similitude therefore between the two cases.

[1203]

Supra 1101.

It is a circumstance attendant upon tithes in general, and on those of milk in particular, that they cannot be collected without some degree of inconvenience, and whoever becomes entitled to them, must accept them liable to those inconveniences. It is demonstrable to those who know the situation and extent of the parish of *Dittisham*, that the mode of setting out the tithes of milk, which the respondent expects by every tenth day's milk, must be attended with great inconvenience, and much more than would arise from the custom which the appellants claim; because it is clear, that every rector will become entitled, on the tenth day after his institution, to all the milk in his parish; so that in a parish of large extent, and in which there are large dairies, and even in the parish of *Dittisham*, he would find much trouble in collecting all the milk on every tenth day; his dairy should be as large as all the dairies in his parish; it would be necessary for him to have as many pans or vessels to contain his milk as all his parishioners together; in short, on every tenth day he would be deluged with milk, and upon the intervening days he would have none. The inconvenience which would attend this mode of setting out the tithes of milk, as to the appellants, by depriving them of milk for their calves and other purposes of domestic use, is too obvious to be pointed out; and it can be of no other advantage to the respondent to establish the mode of tithing which he contends for than to give him the power of demanding an exorbitant price for the tithe of milk, or of taking it in kind from those who have incurred or may incur his displeasure, in a manner the most inconvenient and oppressive.

In support of the decree the plaintiff stated the following reasons:

1. The established course of setting out tithe-milk is, that the

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entire meal of the whole herd of cows should be set forth every tenth day, both the morning and the evening's meal.

*The custom, as laid in the appellant's answer, is unreasonable and illegal; it would be so expensive and inconvenient for the respondent to collect the tithe-milk, according to the supposed custom, that it would not be worth collecting.

2. If the custom was good in law, yet it is not so precisely and formally pleaded, as is necessary and required by courts of law and equity.

3. If the custom was good and well pleaded, yet it is not supported by evidence; nor was there evidence sufficient given in support of it, to warrant the court to direct any issue respecting it.

June 18, A. D. 1782.

7 Bro.
P.C. 83.
(2d ed.)

Ordered and adjudged, that the appeal be dismissed, and that the decree therein complained of be affirmed, with one hundred pounds costs.

H. 21 Geo. III. A. D. 1781. Scac.

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S. C. on the
point of no-
tice.

Serjt. Hill's
MSS.

vol. xx.

p. 118. co-
pied from
Mr. Calde-
cott's Note-
book.

4 Wood's
Decr. 159.

7 Bro.

P.C. 64.
(2d edit.)

A notice
given on
the 8th of
September,
is not suffi-
cient to de-
termine a
composition
for tithes
from year
to year,
commenc-
ing the 29th
of Septem-
ber. Tithes
of hot-
[1205]
house fruits
and green-
house
plants de-
creed.

THE bill stated, that the parish of *Kensington*, in the county of *Middlesex*, consisted of a rectory and vicarage; that the vicarage was endowed; that the vicar thereof was, by endowment, prescription, or otherwise, entitled to a moiety of the tithes of corn, grain, and hay; to the whole of the small tithes; and all offerings, oblations, obventions, and other vicarial dues, yearly arising within the whole of the parish, particularly to the tithes of wool, lambs, milk, eggs, fruit, herbs, cabbages, potatoes, turnips, garden-stuff, plants, flowers raised for sale, pines, melons, grapes, hot-house plants, flower-roots, hemp, flax, and honey; that the defendant *Waller* was, in the year 1770, collated to the said vicarage, and had ever since been vicar thereof, and entitled to the tithes aforesaid; that he shortly before the 8th of *September* 1777 let the tithes of that part of the parish which lies on the north side of the king's highway leading from *Hyde Park Corner* to *Counter's Bridge* to *J. Hall*, to whom the plaintiff and other occupiers of farms in that part of the parish paid their tithes after the rate of twelve shillings an acre yearly for the arable land, and seven shillings an acre yearly for the grass land; that he the defendant, *Waller*, also shortly before the said 8th day of *September* 1777 agreed to let the tithes of the other part of the parish, which lies on the south side of the king's highway leading from *Hyde Park Corner* to *Counter's Bridge* (which consisted chiefly of nurseries and garden grounds, and was of much greater yearly value to the occupiers than arable

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and meadow grounds) to the defendant *B. Bryan*; that in consequence of such agreement, he the defendant, *Waller*, delivered a notice on the 12th of *September* 1777, dated the 8th of the said month, to each of the defendants and others occupiers of nursery grounds and lands in that part of the parish which lies on the south side of the king's highway aforesaid, addressed to them respectively as follows: "Please to take notice that the composition to be paid for the tithes of land in your occupation will determine on *Michaelmas-day* now next ensuing; and that I have let such tithes to *Benjamin Bryan* from that day, to whom you are hereby desired to account for the same;" that *B. Bryan*, between the 20th and 27th days of the said *September*, delivered to each of the defendants and other occupiers of the said nursery grounds and lands, a notice, dated the 10th day of the said month, signed by him, and addressed to the said defendants and others respectively, as follows: "Please to take notice, that I shall take the tithes in kind for the land you hold in the parish of *Kensington* from *Michaelmas* next: that *Waller*, in consequence of such agreement, by indenture dated the 27th day of the said *September*, demised to *Bryan*, his executors, &c. from *Michaelmas* 1777 for the term of six years all his said tithes yearly arising within that part of the parish which lies on the south side as aforesaid, at the yearly rent of 280*l.* with certain provisoes as therein mentioned; that the plaintiff soon afterwards agreed with *Bryan* for an assignment of such lease; that the said plaintiff, on or about the 27th of the said *September* delivered to each of the said defendants and other occupiers of nursery grounds and lands in that part of the said parish a notice in writing signed by him, and addressed to the said defendants and others, respectively dated on or about the 27th day of the said *September*, as follows: "Sir, Having taken your tithe of Mr. *Bryan*, I hereby give you notice not to move any of your crops after *Michaelmas-day* next ensuing the date hereof, without giving notice that the same may be properly tithed; and for your conveniency, I will accept of notice sent for me at Mr. *Bryan's* house in *Earl's Court* for to come and tithe the same." The bill then stated, that the defendants before *Michaelmas* 1777, and ever since, had occupied lands, particularly nursery grounds and gardens, within that part of the parish that lies on the south side as aforesaid; that they [1206] had respectively cut, plucked, gathered, pulled up, received, had, and taken, upon and from the said lands, nursery grounds, and gardens, divers quantities of trees, shrubs, fruit, herbs, greens, cabbages, collards, potatoes, turnips, and various other kinds of garden-stuff, plants, roots, flowers for sale, pines, melons, grapes, hot-house plants, and flower-roots of various kinds, hemp, and flax; that they had also since such time kept and fed on the said

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lands, cows, which yielded and produced milk and calves; and had also kept ewes and other sheep, from which they had lambs and wool; that they had geese, ducks, hens, and other poultry, which laid eggs; that they also had kept several hives of bees, which produced honey; and had also divers other tithable matters and things from the said lands, nursery and garden grounds, the tithes of which were accounted small tithes; that the tithes of the said matters and things ought to have been set out for the plaintiff, who had applied to them to set out and pay him the said tithes, or make him a satisfaction for the same, which they had refused to do, under some agreements with the defendant *Waller*, on the 2d of *October* 1771, and the 17th of *January* 1772, as stated in the bill; but that the said agreements were only verbal, and not reduced into writing, and were only for one year, and for so much longer as he and they should chuse. The bill then charged, that the defendant *Henry Hutchins* had entered into an agreement with *Waller* on the 23d day of *January* 1772 (subsequent to the date of the said pretended agreement) to take all the tithes of the land then occupied by him from *Michaelmas* 1771 to *Michaelmas* 1772, at the yearly rent of thirty-four pounds nineteen shillings, and had ever since paid that sum to *Waller*; that supposing such prior agreement to have been good, it was waived by such subsequent agreement; that in *July* or *August* 1777, *Hutchins* desired *Waller* to compound with him for his tithes, and requested that he would not collect them in kind; that *Waller* then told him it was his own fault that he had not an agreement before for a term of years, or during his incumbency. The bill then further charged, that the said agreements being during pleasure, had been determined by the aforesaid notice, and prayed that the defendants might account with the plaintiff for the single value of the tithes, which, since the 24th day of *March* 1778, had arisen from the lands in their respective occupations, and pay him what should appear due on such account.

[1207] The defendant *Rouse* and several others admitted, that the parish of *Kensington* consisted of a rectory and a vicarage; that the vicarage was endowed, and the vicar thereof entitled to the tithes of corn, grain, hay, small tithes, offerings, oblations, and other vicarial dues, yearly arising in that part of the parish which lies on the south side as aforesaid, particularly to the tithes of wool, lambs, milk, eggs, fruit, herbs, garden-stuff, plants, flowers raised for sale, hemp, flax, and honey; that the defendant *Waller* was in the year 1770 presented thereto, and had ever since been vicar thereof; and that the leases had been made, and the notices given, as stated in the bill, excepting that such notices were delivered to each of them on *Michaelmas-day* 1777, and not before, as they verily believed; and they severally set forth a particular account of the lands and

grounds by them occupied within the parish before and since *Michaelmas* 1777, and how and in what manner such lands and grounds had been used and occupied during that time.

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The defendants *S. Hutchins*, *B. Williamson*, and *H. Hewitt*, said, that for about fifty years before a composition of six shillings an acre had been paid for the nursery grounds in the parish to the vicar; that *Waller*, about 1771, being desirous of raising the composition to ten shillings an acre, divers meetings were had between him and the occupiers: that on the second day of *October* 1771, at that meeting, the defendant *H. Hewitt* paid *Waller* one year's tithe, at the old rate of six shillings an acre, to *Michaelmas* 1771, and took a receipt for the same; that after some discourse between them, the defendant *Waller* insisted on ten shillings an acre, which they refused; that he proposed to accept nine shillings, and the defendants offered eight shillings and sixpence; that thereupon they tossed up whether it should be eight shillings and sixpence or nine shillings; which being consented to, *Waller* tossed up half-a-guinea, and the defendant *S. Hutchins* called *Head*; that the said half-guinea having settled with the head upwards, the defendant *Williamson* said, "*Doctor, We have won;*" that it was thereupon agreed, as they understood, between him and them on behalf of the said nurserymen, that the composition for the tithes of all the nursery grounds within the said parish should for the future, during his, *Waller's* incumbency, be at the rate of eight shillings and sixpence an acre; that the said defendant *Hewitt* informed *Waller*, that some memorandum should be made of the agreement that had been made; that thereupon he assented thereto, and wrote under the said receipt so given by him as follows: "Agreed for eight shillings and sixpence an acre for every year *hereafter*;" that they then considered, and still consider the said agreement as a permanent agreement between him and the said defendants on behalf of themselves and all other nurserymen within the parish; and that it was to continue during the incumbency of *Waller*; that the said defendant *Hewitt* was the more confirmed in such opinion, because he having paid his composition for tithes at the rate aforesaid up to *Michaelmas* 1772, the said defendant *Waller* gave him a bill and receipt as follows, *viz.* "Messrs. *Hewitt* and *Smith* debtors to the reverend Mr. *Waller* on account of tithes due at *Michaelmas* 1772, for twenty-one acres of nursery ground at eight shillings and sixpence an acre, as by agreement, eight pounds eighteen shillings and sixpence. Received this nineteenth day of *December* 1772, the above contents in full by me *James Waller* vicar:" and because *Waller* had continued to receive the said composition up to *Michaelmas* 1777; that for many years before 1772, they had been accustomed to pay a composition for their tithes after the following rates, *viz.* "six shillings an acre *per annum*

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for garden ground, and three shillings for arable land;" that upon *Waller* becoming vicar, they waited upon him to know if he would take the aforesaid compositions of them, which he would not consent to, but demanded six shillings an acre both for the garden ground and arable land, which the defendants thought very unreasonable, and resolved not to agree to it, as he was entitled to no more than a moiety of the great tithes, and they had only paid up to that time three shillings an acre to his predecessors, and three shillings an acre to *F. Greening*, the owner of the other moiety: that *Waller* being determined not to abate, and the said farmer gardeners not to accede to his proposal, they parted dissatisfied, when *Waller* said he would take his tithes in kind, which he attempted to do; that finding it would not answer, he soon afterwards agreed with the defendants and the rest of the farmer gardeners, that upon paying their six shillings an acre, as well for garden ground as farming produce, crop or not crop, (excepting seven shillings an acre for ten acres in the possession of the defendant *Coombes*, which *Waller* insisted was a fruit garden), he would give them all leases during his incumbency; that the defendants, for avoiding all disputes with him, acquiesced therein; that they had ever since paid their tithes according to such agreement: and they submitted, that they were entitled to have such agreement carried into execution, and to have a lease granted to each of them of their said tithes agreeable thereto.

[1209] The defendant *J. Rouse* said, that having paid the composition for his tithes on the tenth of *January* 1772, in consequence of such agreement, a receipt was given to him by *Ed. Cooper*, on behalf of *Waller*, at the foot of which receipt, in confirmation of the said agreement, *Waller* wrote as follows: "Agreed in future to pay for thirty-one acres two roods, at six shillings an acre, which will amount to nine pounds nine shillings;" that he, the defendant, had accordingly paid him the said nine pounds nine shillings, for his annual composition, every year since up to *Michaelmas* 1777, for the said thirty-one acres two roods, and also after the same rate *per* acre for all the lands he had since occupied in the parish.

The defendant *J. Rubergall* said, that on the tenth of *January* 1772 he paid *Waller* the composition for his tithes up to *Michaelmas* 1771, at which time he gave him a receipt for the same, and wrote underneath it as follows: "Agreed in future for thirty-five acres at six shillings an acre, which will amount to ten pounds ten shillings."

The defendant *S. Hutchins* said, that on the sixteenth of *December* 1772 he paid *Waller* the composition for his tithes up to *Michaelmas* 1772, at which time he gave him a bill and receipt written and signed by him, *viz.* "Mr. *Samuel Hutchins* debtor to the reverend

Mr. *Waller* on account of tithes due at *Michaelmas* 1772, to sixteen acres one rood nursery ground at eight shillings and sixpence an acre, as by agreement, six pounds eighteen shillings and three halfpence; to ten acres corn land, &c. on the south side of *Kensington* parish, at six shillings an acre, as by agreement, three pounds; nine pounds eighteen shillings and three halfpence. Received this 16th day of *December* 1772 the above contents, *James Waller*;" that pursuant to the said agreement, he had ever since, up to *Michaelmas* 1777, paid eight shillings and sixpence an acre for the nursery grounds, and six shillings an acre for the corn land.

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The defendant, *H. Hutchins*, insisted that *Waller*, on the 17th of *January* 1772, entered into, and with his own hand wrote and signed an agreement with him, whereby he agreed to let him, so long as he should continue vicar of the said parish, all the tithes (whether rectorial with which he was endowed or vicarial) of 116 acres, which he then occupied in the parish, at the yearly rent of thirty-four pounds nineteen shillings, with a proviso, that if the then mode of cultivation should be altered, the said agreement should be void; but that so long as the said lands should continue in their then state, and so long as he should continue vicar of the said parish and *Hutchins* the occupier of the said land, the said agreement was to be binding on each party, and preparatory to a lease between them. He said, he had ever since paid *Waller* pursuant thereto the yearly sum of thirty-four pounds nineteen shillings, and insisted on the benefit thereof. [1210]

All the said defendants insisted that the plaintiff before the agreement for and execution of the lease to him from *B. Bryan*, had full notice of the said agreements having been entered into between *James Waller* and the defendants; and that he, by having entered into them, and having ratified the same, and received the said several compositions from them up to *Michaelmas* 1777, without objecting thereto, had manifested his sense and understanding thereof, and could not now vary or rescind the same.

The defendant, *H. Hewitt*, and others, insisted that the vicar was not entitled to the tithes of pines, melons, hot-house plants, green-house plants, or of any plants, or roots growing or planted in hot-houses, or of any exotics, or of any plants or trees inoculated or grafted, or of any plants, trees, shrubs, or roots, purchased or planted in their nurseries or garden-grounds, and from thence sold out again without having made any increase in number.

All the defendants insisted, in case *Waller* had any right to determine the composition in the manner he had attempted, which they denied, that the several notices given to determine such compositions and take the tithes in kind, were short and insufficient, considering the nature of the crops to be tithed.

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The defendants, *J. Rouse* and others, by their further answer, also submitted to the judgement of the court, that the vicar was not entitled to the tithes of pines, melons, hot-house plants, green-house plants, or of any plants or roots growing or planted in hot-houses, or of any exotics within the said parish, or of any plants or trees inoculated or grafted, or of any plants, shrubs, trees, or roots purchased and planted in their nurseries or garden-grounds, and sold out again without having made any increase in number.

The defendant, *H. Hutchins*, admitted that he had never signed the agreement dated the seventeenth day of *January* 1772, but left the plaintiff to the proof thereof; and he recited the several conversations touching assessing *Waller* to the poor-rates for his tithes; and said that he came to some agreement touching the same, as stated in the answer, and insisted on the impossibility of setting out the tithes for the reason aforesaid.

Cross Bill.

[1211] *H. Hewitt* and others filed their cross bill against *Waller*, *Bryan*, and *A. Adams*, and thereby particularly insisted on the agreement entered into between the said *J. Waller*, as vicar of the parish, and the plaintiffs and others occupiers of nursery grounds therein, for an annual composition for the tithes of such nursery grounds, at the rate of eight shillings and sixpence an acre; and also on the agreement entered into between him and them, &c. occupiers of garden grounds not used for nurseries, and lands used in common tillage within the parish, for an annual composition for the tithes of such garden ground and land, at and after the rate of six shillings an acre during the said *Waller's* incumbency; and that he was in equity and conscience bound to perform the said agreements. They insisted, that he having entered into and ratified the said agreements, could not afterwards make any valid conveyance, lease, or demise of such tithes to the said *B. Bryan*, or any other person; and that such lease to the said *Bryan*, and the assignment thereof to *A. Adams*, were void and of no effect against the plaintiffs, having been made by persons who had no right to make the same. They therefore prayed, that *Waller* might be decreed to accept the annual sums of eight shillings and sixpence, and six shillings, as compositions for the said tithes, and perform the several and respective agreements so made and entered into by him with them, and might indemnify them respectively from the several claims of the other defendants on account of their said tithes, the plaintiffs being willing to pay the said defendant *Waller* what was due on account of the said compositions for the said tithes, at the rate of eight shillings and sixpence, and six shillings an acre respectively; and also to pay the same annually during the incumbency of *Waller*, as a composition for the tithes of the said grounds in their respective occupations; and that the said *B. Bryan* and *A. Adams* might be restrained by the decree of

this court from taking their tithes in kind of the said grounds, and from any ways molesting the said plaintiffs on account thereof.

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The defendant *Waller* said, that after his induction into the vicarage, he found that the several annual compositions paid by the occupiers of lands and grounds in the parish for the tithes of such lands and grounds, were considerably under the real values thereof; that he thereupon signified his intention to raise the same; and he stated the meeting of the second of *October* 1771, and the proposals that were then made; but insisted that he did not mean to agree to toss up whether nine shillings or eight shillings and sixpence should be paid for the said composition; but he admitted that he at length consented to receive from the said occupiers after the rate of eight shillings and sixpence an acre, as a composition for the tithe of their said lands; but that he meant only to accept such composition for a year certain, or such longer time as he should think proper. He insisted that no agreement in writing was then, [1212] or at any other time, entered into between him and the plaintiffs, or any other occupiers of the said nursery grounds, for a composition for their said tithes. He said, that about the twenty-third of *January* 1772, he entered into an agreement in writing with *H. Hutchins*, as before mentioned. He also said, that when the plaintiff *J. Rouse*, in 1772, paid him a sum of money as a composition for his tithes, and took a receipt for the same, he wrote down upon the same what sum he was to pay as a composition for his tithes for the then next year; but he denied that it was at either of the said times, or at any other time or place, consented to or agreed between him and the other defendants, or any of them, on behalf of themselves and the other occupiers, that the aforesaid, or any other annual composition for tithes of all or any such nursery grounds, should continue as long as he should continue vicar, or that any other agreement than such as before mentioned was then, or at any other time, entered into between him and the plaintiffs, or any other of the said occupiers, or that he had ever offered them a lease of their respective tithes. He denied, that he had entered into any agreement with such of the plaintiffs, or other persons, as occupied garden grounds or other grounds not used for nurseries, or for lands used for common tillage, to accept in future a composition of six shillings an acre, or any other composition for the tithes of such grounds and lands for every year thereafter during his incumbency, or for any other term save as aforesaid, or that he had at any other time entered into any agreement with them. He insisted that it was not understood or considered by the plaintiffs and all persons, that the agreements respectively made as aforesaid were to continue in force, or be binding on them and the defendant during all the time he should so continue vicar of the parish, or for

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any longer time than one year from the time of the making thereof respectively. He admitted he had yearly, from *Michaelmas* 1771 to *Michaelmas* 1777 inclusive, received the said annual compositions of eight shillings and sixpence, and six shillings an acre from the plaintiffs, except *A. Shailer*, and from the several owners and occupiers of such nursery grounds, and garden grounds and lands used in common tillage in the said parish. He said, that in *August* 1777 a demand was made upon him for the poor's rate in respect of the said tithes, contrary to the former practice of the parish; that therefore a meeting was held at his house of the parishioners and other occupiers within the parish, when they came to terms, as in his answer was mentioned. He also said, that he entered about this time into an agreement with the defendant, *B. Bryan*, to grant him a lease of the tithes of the lands on the south side of the king's highway, as aforesaid, for six years, if he should so long continue vicar of the parish, at 280*l. per annum*; that in pursuance thereof, about the 9th of *September* 1777, he caused the said plaintiffs and other occupiers of nursery grounds, garden grounds, and other lands within the said parish, to be severally served with notices to the purport or effect as in the bill mentioned; and that on the 27th day of *September* 1777 he executed a lease to the said *B. Bryan*.

The defendants, *B. Bryan* and *A. Adams*, spoke to the same effect.

The defendant, *B. Bryan*, insisted on the agreement entered into before the 8th day of *September* 1777 between *Waller* and him for a lease of the tithes arising in that part of the parish as before-mentioned, and of the lease executed to him by *Waller* of such tithes on the 27th day of the said *September*; and said, that in pursuance of the said agreement, he had, some time between the 20th and 27th days of *September*, caused to be delivered notices to the plaintiffs and other occupiers of land in the parish, dated the 10th of the said month, that he should take the tithes in kind of the lands they held in the said parish from *Michaelmas* then next. He insisted, that the other defendant *Adams*, soon after the execution of the said lease, having agreed with him for an assignment thereof, and to pay him the yearly sum of sixty-three pounds, he, by indenture dated the 24th of *March* 1778, assigned to him all those the tithes and premises demised to him by the said lease from the defendant *Waller*, and all his estate and interest therein for the remainder of the said term.

The defendant *A. Adams* insisted on the said agreement entered into between him and the defendant *Bryan* for an assignment of the lease executed by *Waller*, and of the indenture of assignment thereof executed to him by *B. Bryan*; that in pursuance of the said agreement, he caused to be delivered, on the twenty-seventh of

September 1777, to each of the plaintiffs and others parishioners of the parish, a notice dated on the twenty-seventh day of September, purporting that he had taken their tithes, and that they were not now to move any of their crops after *Michaelmas-day* then next, without giving notice to him, that the same might be properly tithed: and he insisted on his right to tithes in kind of the several tithable matters arising on the lands occupied by the said plaintiffs as aforesaid; and hoped that he should not be restrained from [1214] taking proper measures for the recovery thereof.

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Macdonald, *Kenyon*, and *Selwyn*, of counsel for the occupiers, objected, that the notice to determine the composition was insufficient, it being given less than a month before *Michaelmas-day*, at which time the composition was payable. They insisted that the agreement was intended to be permanent. The agreement with the predecessor subsisted during the whole incumbency. It was natural therefore that they should wish for and intend a renewal of such permanent agreement. The words, "agreed for 8s. 6d. per acre, for every year hereafter," must mean during incumbency. The others, "as per agreement," or the like, shew that there was some general agreement. They argued farther, that the subject itself, viz. peach-trees and the like, is not tithable. 1 *Ro. Abr.* 637. pl. 6. is full of bad law. The parson has the tenth peach, &c. is he also to have the root? This is not like to *silva cædua*, which is renewable annually. But the produce of a hot-house is not the produce of the earth. If tithe be payable of this, then it must be also of pots in a house, sallad raised on a flannel, &c. Is it convenient that this should be tithable? if it be, the expence of raising it is so enormous, that the tithe would amount to a prohibitory tax. The claim is unsupported by any case or *dictum*. If this be allowed, by the same rule polished steel and other manufactured-produce of the earth would be tithable.

Mansfield for the vicar. — There is no binding agreement in this case. The court would require something extremely strong indeed to bind the vicar for ever, where he has not a scrap of paper to bind the other parties. The general nature of these transactions is, to be binding only as long as both parties shall please. And then if the memorandum added to *Hewitt's* receipts amounts to an agreement, it can bind no farther than that. The others are unconnected with *Hewitt*, and their payments being of a similar nature, proves nothing: this as to the nursery-men. As to the gardeners, the notice to determine the agreement is good. The case of *Glasse v. Caldwell* shews it to be so. For this is very different from the case of a farm. There is no new stock to provide; nothing new to do; nothing besides severing the tenth instead of taking all away. As to the hot-houses — Here the Chief Baron interrupted

Supra 1030.

1781. him, saying, there was no evidence as to these; therefore that the regular way would be to direct an account (if any proper), in which case the Deputy Remembrancer would make his report special, if he had any doubts, and then the court would have the circumstances stated in his report as evidence to decide upon, and that report might be excepted to.

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But *Mansfield* was desired to go on. — These articles are the produce of the earth, though mixt and meliorated for the purpose. Are cucumbers objected to? No. What then can be said as to melons? every thing raised in a garden is principally in consequence of manure and labour; and yet it is tithable. As to exotics, no objection can be made to them; for hops, madder, saffron, tobacco, were originally exotics. He cited *Breamer v. Thornton*, *Hardr.* 203. to shew that a composition by parol was not binding on the parson.

Scott S. S. — Here are two classes of defendants, and they ought to be distinguished. I own the expression “for every year hereafter” to be very strong; but the circumstances explain it. There are only three receipts in so many years which have it; there is no agreement in writing, nor any other written testimony. The court would rather explain these three receipts by all the rest, than all the rest by these three. Either the other gardeners are not to be prejudiced by *Hutchins’s* acts, or they must consent not to be benefited by them, *viz.* by his receipts.

The argument that hot-house plants, &c. are exotics, and therefore not tithable, proves too much, for all but crabs were originally exotics. Cherries were brought into *Europe* by *Lucullus*. Vines were introduced here later than in *France*; and there they were not indigenous. Walnut signifies a foreign nut (*a*). *Wall* and *Wales* were so called by the *Saxons* for the same reason (*b*). Cabbages were brought from *Holland* in the time of *Charles 2.* when a cabbage cost at least a guinea. Guineas and cabbages coming here together (*c*), the terms were convertible. Potatoes were introduced by sir *Walter Raleigh* into *Ireland*, whence they were brought

(a) Val-hnutu, Walnut. *Potius autem Valh-nutū, sc. Wallicæ sive peregrinæ nuces.* Lye’s *Saxon Dict.*

(b) Valh, i. q. Vealh, peregrinus, alienigena, barbarus. *Britanni a Saxonibus fugati, quasi sibi extranei, Vealhar, Vealar, Veallar, appellati sunt.* Lye’s *Saxon Dict.*

(c) I suspect the accuracy of the report in this part. Guineas were first coined in *England* in 1673; but that cabbages were then first introduced should seem to be a mistake. *Anderson*, in his *History of Commerce*, states them to have been brought hither from *Flanders* about the year 1524. That they were well known in *England* before the time of *Charles the Second*, *Shakspeare* will tell us;

Eva. Pauca verba, Sir John; good worts.
Fal. Good worts! good cabbage.

Merry Wives of Windsor.

Perhaps, the plant is indigenous in this country, as it still is found wild in many parts of this kingdom, particularly about *Dover*. The varieties of it, and the present improved state to which the different sorts are brought, are the mere effect of culture. As our neighbours on the continent long preceded us in horticultural improvements, it is probable that the plant, as raised and meliorated by art, was imported from them, and thence the notion that it was an exotic.

here. There is some account of them in a note in *Johnson and Stephens's* edition of *Shakspeare* (a). In the north all the common * fruit is raised by art and at great expence. As to the expence, if that be an objection, it would have excluded cabbages, and most other things; and hereafter the raising of pines may cease to be expensive. In *Gibbs v. Wyborne*, *Sir W. Jon.* 416. it was settled, that trees drawn out of nurseries and sold were tithable. As to the notice, this is not similar to the cases that have been mentioned.

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Supra 501.

A person claiming a right to retain tithes, is not similar to a tenant of land. There is no case where it is holden that a parol agreement to retain tithes during incumbency is good. Nor can any good reason be given why an earlier notice should be given than immediately previous to the beginning of the composition. See what is said by *Holt C. J.* in 2 *Salk.* 414. In *Hume v. Wright*

(a) The note here alluded to is upon the passage in *Troilus and Cressida* of "Luxury with his potatoe finger." Act. iv. Sc. 2. It is a very long note, too long to be inserted in the usual place, immediately under the text, and is therefore subjoined at the end of the play. The part to which Mr. Scott alludes, and which is wholly borrowed from *Campbell's Political Survey*, is as follows:

"It appears from Dr. Campbell's *Political Survey of Great Britain*, that potatoes were brought into Ireland about the year 1610, and that they came first from Ireland into Lancashire. It was, however, forty years before they were much cultivated about London. At this time they were distinguished from the Spanish by the name of *Virginia potatoes* or *battatas*, which is the Indian denomination of the Spanish sort. The Indians in Virginia called them *openank*. Sir Walter Raleigh was the first who planted them in Ireland. [*Campb. Pol. Sur.* vol. i. p. 95. notes.] Authors differ as to the nature of this vegetable, as well as in respect of the country from whence it originally came. *Switzer* calls it *Sisarum Peruvianum*, i. e. the *skirret* of Peru. Dr. Hill says, it is a *solanum*, and another very respectable naturalist conceives it to be a native of Mexico." [Vol. ii. 246. notes.]

If the reverend commentator had not been too deeply intent upon illustrating a favourite allusion to regard the ascertaining of an historical fact, it must have occurred to him either that Dr. Campbell had fixed the date of the introduction of the potatoe into this country too late, or that the potatoe which the Dr. was speaking of was not the same plant with that which *Shakspeare* and the writers quoted in the note were alluding to: for Dr. Campbell fixes its introduction into Ireland, whence it was some time afterwards brought into this country, so late as the year 1610; but the play of *Troilus and Cressida* was written and printed before that year, and several of the other books mentioned in the note were of still earlier date, such as the translation of the *Menæchmi* of

Plautus in 1595, *Greene's Disputation between a Hee Coneycatcher and a Shee Coneycatcher* in 1597, &c. In truth, the potatoe to which these old authors ascribed provocative qualities, and the modern potatoe, had nothing of identity in them but the name: they were two quite distinct and different plants. The former was a kind of *convolvulus* or *bindweed*, and was the Spanish *battata*, of which the English name *potatoe* is evidently a corruption. This plant was well known and in common use in Gerard's time, who tells us that it grew in India, Barbary, Spain, and other hot regions, and was to the inhabitants of those countries, as well as of Italy, an ordinary food; but that he could not succeed in getting it to flower in this country, so that he was unable to give a description of its blossom. The modern potatoe is a *Solanum*, the *Solanum tuberosum* of *Linnaeus*, and is a native of Peru. The Indians called it *openank* or *pappus*, which latter word signifies "the roots," and was the common name of these esculent plants. It had the name of *potatoe* given it in this country from its supposed resemblance in form and taste to the Spanish *battata*, and was distinguished from it by the addition of the *American* or *Virginia potatoe*. *Linnaeus* informs us, that this plant was introduced into Sweden in 1590, and it was certainly known in this country before the time which Dr. Campbell assigns for its first importation into Ireland: for Gerard gives us in his *Herbal*, which was published in 1597, a very accurate plate of it in a very flourishing state, and says, that he had the plants then growing in his garden, where they were thrifty and vigorous, and succeeded well. It is evident from hence, that *Switzer* and Dr. Hill are speaking of two different plants, the one, meaning the Spanish potatoe, the *Sisarum Peruvianum*, which is the name which Gerard likewise gives to that sort of potatoe; the other, meaning the modern potatoe or *Solanum*, which, as we have above stated, received the trivial name of the former from a fancied resemblance to it.

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in this court, *M. 16 G. 3. (a)*, where the party insisted on a *modus*, it was holden that no notice was necessary, because he set up an adverse title. I would rest upon the same reason: for I cannot see that that defence by alleging a *modus* is more inconsistent with insisting on notice, than a permanent composition is, or more to be considered as an adverse title.

Mr. *Macdonald* in reply. — In new matters the legislature does not quite keep pace with the improvement of the times. Here, in a case new, the decision of the court must make the law.

[1218] As to the power of demising tithes by parol, let us examine the cases. Before the statute of frauds, we have the case of *Gomersal v. Bishop*, *Cro. Eliz.* 136. in prohibition, where the power to demise seems to have been admitted, though the case was decided upon a fault in the declaration. In *Nelson v. Woodward*, *Cro. Eliz.* 188. 249. it was holden, that a grant of tithes without deed for life was not good, though for years it might be. In *Hawles v. Bayfield*, *Hob.* 176. it was holden that an agreement for tithes during incumbency without deed was not good. In *Honeycomb v. Swete*, *Cro. Ja.* 668. it was ruled that a parol agreement to retain tithes for years was good. And upon the authority of this case, it was determined in *Penwood v. Evans*, 1 *Lev.* 24. that a parol contract to retain was good. In *Breamer v. Thornton*, *Hardr.* 204. there was a different determination in this court, viz. that a parol agreement to retain was not good for more than a year. But in the present case there is more than a parol agreement. It is not indeed an agreement in strict form, yet it is sufficiently reduced writing; and there is no difference between tithes and other property, as far as concerns the nature of the writing which is the evidence of a binding agreement. As to the notice, the case of *Breamer v. Thornton* only shews when the notice is too late, and nothing more. This and the other case both allude to the cultivation on the faith of the agreement. The present rule respecting farm *moduses* is a modern introduction, founded upon reason and convenience. The notice in the case of tithes was formerly grounded on the rule as to notice upon a mere tenancy at will. Why should we not make it analogous to the modern improvement of notices on tenancy for years? The dissent of Mr. Baron *Perrot* in the case of *Glasse v. Caldwell*, the opinion given by Mr. *Wilbraham*, and the constant practice, are all very material circumstances.

As to the subject of the tithe in this case, our objection is, not that things not indigenous are not tithable; but that things not the produce of the soil and climate are not tithable. I wish that

Mr. *Scott* had pushed his argument a little farther, and supposed the cold hand of the vicar to have been thrust into the hot-house: would the plants have been so far nourished, as to become matters of common use? There is a great difference between the plant in the hot-house in an artificial state, and afterwards when naturalized to soil and climate. It is quite new to demand tithes of things of this sort; it would suffocate such improvements, and be the most impolitic thing in the world; besides they are not in their present state matters of profit. As to ingrafted trees, many of them fail: of what then are the tithes to be taken? of all, or which — of fruit and trees, or not?

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Lord C. B. — This cause has undergone great examination and discussion; though the facts are plain and clear. The original bill is brought by *Adams*, assignee of a lease under the vicar of *Kensington*, for the tithes of nurseries and gardens. The vicar's title [1219] by endowment is clear; but the defendants say he is not entitled to demand tithes in kind, because of a binding agreement for a composition to continue during incumbency; and they file a cross-bill to establish this defence by compelling a demise accordingly, with a little variation between the case of the nurserymen and that of the gardeners. As to the nurserymen the evidence arises from four receipts. First of 1771 has added to it, "agreed for 8s. 6d. per acre for every year hereafter." Second of 1772 for "as by agreement." Third given to another person in 1772, "as by agreement." Fourth to another in 1773, "as by agreement." Fifth at a less sum, "in future as for other nursery grounds." And it is insisted, that this is an agreement on behalf of all. It is necessary that an agreement to be executed by a court of equity should be plain and clear; and this is a great ground of the statute of frauds. Now it is said, "every year hereafter" must mean during the continuance hereafter. But the intent must be taken, among other things, from the subject matter of the agreement. Here the subject was continually changing. This does not appear then certainly and conclusively to be a permanent agreement during the whole incumbency. If this does not, the rest are still less so.

As to the gardeners, there is more evidence for them, if not contradicted. There are two receipts, both in 1772; the one "agreed in future to pay for thirty-one acres and two roods:" the other, "agreed in future at 6s. per acre for 35 acres." These are explained by an instrument dated seven days after, signed by *Dr. Waller*, agreeing to take a certain sum, "provided, if present cultivation altered, void — if continued, binding and preparatory to a lease." Undoubtedly this, being made by *Hutchins* for the rest, is a binding agreement for a lease. What answer is given to this? Why, that it was never accepted by *Hutchins*, but rejected by

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him, saying he would agree only for a year. This agreement thereupon was carried back, and a new one prepared for one year only, which was signed by both the parties. As to the two receipts, notwithstanding the memorandum at the bottom, yet it is in proof that at their next payment they both declared they would not continue to pay so much, and that he should take his tithe in kind. The agreement therefore was not binding in the consideration of the parties themselves. On the delivery of the notice to *Hutchins*, he only said, he was sorry they were disturbed, but expressed nothing about a binding agreement. I am satisfied therefore, that, as to the nurserymen, there is not sufficient evidence of an agree-
[1220] ment; and as to the gardeners, it is falsified. As to the nurserymen, if there had been more evidence, there would have been a doubt on what ground their claim could have been founded. As to the gardeners, indeed, it is expressly said, "for a lease," and therefore plain. But as to the nurserymen, how or why is an agreement not binding in law to be executed in a court of equity? a lease does not even appear to have been in contemplation, which would have made a great difference.

Are then the compositions actually determined by the notice which has been given? There was much uncertainty in this learning till the case of *Glasse v. Caldwell*. But it is unnecessary to discuss that case now; for it comes within the case of *Hume v. Wright*; for the defence is an adverse title, and there is no difference between insisting upon a *modus* and a binding composition. The present case indeed is stronger, because it is accompanied with a cross bill.

It remains then to see, whether the matters in question are tithable. As to melons, pines, &c. I know not how to draw any line between them and other produce of gardens. What is the tithe of gardens? It is predial. The notion of artificial heat and soil would exclude almost all the produce of gardens: things raised under glasses are raised in an artificial soil. But they must all be subject to the same rule. Inoculation to be sure is a work of art; but art and expence used will not make any difference.

Eyre B. — The case on the part of the lessees is plain. The question then is, whether the defence is sufficient? 1st, Is the composition binding? As to the nurserymen it is too uncertain. As to the gardeners, it is exposed to the same objection; or, if it be taken on the act of *Hutchins*, then it is contradicted. To found a decree of the court for a specific execution of an agreement, it is necessary that the agreement should be made out to be clear and certain. In this case it is not so: it is ambiguous and loose; it may mean "so long as both parties please." I conjecture that *Dr. Waller* did intend to agree for his incumbency; but, if he did so intend,

that does not prove that he did actually agree, and that all the other parties did so; and there is no proof of any such agreement on the part of the nurserymen and gardeners. It is clear then, that the cross-bill must be dismissed as totally groundless, and I think it should be so with costs. Indeed, if the fact had been other than it is, I am doubtful how the law would have been: for though the agreement would have been good as to time past, yet I am not satisfied that a court of equity can give validity to an agreement by parol, where the subject would have only passed by deed. Here then, these compositions, though subsisting during incumbency, yet are only annual, being by parol. But this only *obiter*; I mean not to decide. [1221]

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As to the second point in the original bill, the insufficiency of the notice; I agree that *Hume v. Wright* is decisive that no notice is necessary. There, the defence set up was an adverse title, *viz.* a *modus*. This is a disclaimer of that relation out of which a notice becomes necessary, by analogy to the case of notice as to tenants in ejectment. But it is said, that the *modus* was perpetual, and that the composition in this case is not so. But it is so as to the vicar; and there is no difference in reason. Nor are there any difficulties attending this decision; for these agreements do not much resemble demises of houses or lands. They are merely another mode of taking the thing. Nor does it occur how it can much affect the raising of the produce, if the value be fair. But occasional inconveniencies are no ground for general rules of law. I think the decision in *Glasse v. Caldwell* the better opinion. It is best to adhere to the old rule, where a new one cannot be made without great difficulties. But this I throw out only *obiter*.

As to the last objection, hot-house plants, &c. are certainly not exempt. The like hardships occurred in wastes, madder, &c.; but an act of parliament was necessary to exclude the right of the parson. The general rule is clear; and the inconveniencies attending it are not so great; and mutual inconveniencies will suggest mutual moderation. If not, a court of justice cannot help it.

Hotham B. of the same opinion.

The court therefore ordered that it should be referred to the Deputy Remembrancer, to take an account of what was due to the plaintiff from the defendants for all the tithes in kind demanded by him, and the usual directions were given for taking the account, and that all the defendants in the original cause should pay to the plaintiff his costs of the suit to that time to be taxed; and the court further ordered, that the cross-bill should be dismissed with costs, to be taxed for the several defendants in the cause.

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7 Bro.

P.C. 64.

(2d edit.)

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From this decree there was an appeal by *Hewitt* and six others to the House of Lords, upon the following grounds:

1. It having been admitted, that the appellants had, under some agreement, paid Dr. *Waller* compositions in lieu of their tithes for every year from *Michaelmas* 1771 to *Michaelmas* 1777 inclusive, therefore, although Dr. *Waller* might have a right to determine the compositions, yet he could not do it without a reasonable notice to the parties; and the appellants contend, that the notices which are mentioned in the pleadings to have been given for determining such composition, and for taking the tithes in kind, unless a new agreement was made with the doctor's real or nominal lessee, were unreasonably too short, and therefore insufficient for that purpose. The notices given by the doctor and his assignee were three in number; the first was given on *September* 12th, the second between the 20th and 27th, and the third upon the 29th of the same month; all these notices affect to put an end to the composition from the *Michaelmas-day* then next. The interval between the earliest notice, and the day on which it was to take place, is not three weeks. It is established, that a tenancy from year to year, in the case of farms, cannot be determined by the landlord without six months notice prior to the end of the tenant's year; and it is conceived that tithes have repeatedly been holden to stand in this respect upon the same footing with corporeal property. It seems reasonable that either party intending to put an end to such a composition, and to pay or require payment of tithes in kind, ought to give a longer notice of that intention, particularly so where the notice is given to the tenant that he may be the better enabled to adapt the mode of his cultivation to the nature of his tenure. It cannot be disputed, but that in the exercise of that discretion, which every man has a right to exercise, and every prudent man will exercise, as to the mode of agriculture most likely to be beneficial to him, it is of importance to him to know, whether he is to set out his tithes in kind, or to pay a pecuniary composition in lieu of them; and to conceal an intention to put an end to such a composition, (continued uninterruptedly for six years, under a supposed agreement,) and thereby delude a man into a belief that it is to continue, appears to be unreasonable and unfair conduct on the part of the lessor, of which, it is presumed, a court of equity ought not to admit him to avail himself. It is a fact, that every landlord thinks himself obliged to give a much longer warning to his nurseryman tenant when he means to determine his holding than he does to the common farmer: the usage has certainly been to give the nurseryman three years notice. If the notice were insufficient, the account ought not to have been

directed; Dr. *Waller* and his lessee would then be entitled to the composition only during the litigation, and, consequently, the respondent's bill would have been dismissed.

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2. The decree directs an account of hot-house and green-house plants. It is conceived that these are not tithable in point of law. If they can be ascribed to any class of tithes, it must be to that of predial tithes, the definition of which is, that they arise merely and immediately out of the ground. The plants in question, it is well known, are not the produce of the soil of this country; a climate and compost must be procured to keep them in a state of vegetation; they do not grow in the earth, nor derive their sustenance from thence; some of them cannot by any art be propagated in this country; and as to pine-apples, one of the principal exotics that can ever produce profit to the parson by their successful increase, it is conceived, they cannot be deemed tithable, when it is considered, that the skill and labour of several years is absolutely necessary to be bestowed upon them, in order to bring them to maturity, independent of the very great expence of hot-houses of the different classes, tan, fire, &c.; that they are nurtured in pots from the first moment of their existence to the final period of it; are removed from one successive house to another, as they make their slow approaches to edible perfection, which is only attainable by the skilful management of artificial heat; that they never communicate with the natural earth, and very often in their last stage to maturity are mere resiants for a few months only in that parish where they are cut; that they are actually a commercial merchandize, are daily bought and sold in their various stages to perfection, and a great part of them actually propagated in one parish, nurtured in the succession houses of a second, and very frequently pushed into fruit, ripened, and cut in a third or fourth parish. Every argument respecting pine-apples may, with equal propriety, be applied to orange-trees, with this additional circumstance, that the orange-tree, in the first instance, costs the importer nearly half as much as he sells it for when arrived to perfection, after many years expensive cultivation, exclusive of thirty *per cent.* duty paid on the importation. These facts are well known — uncontrovertible; and it is scarcely necessary to say, that if the payment of tithes for exotic plants in general, (great numbers of which are annually imported into this kingdom at a very heavy expence, besides freight and duty,) including pine-apples, orange-trees, &c. is to be added to the expence of cultivation, there must be an end to that species of horticulture.— The appellants further presume, that such trees and hot-house plants as actually [1224] grow in the soil, but would not there grow without artificial heat, are not the proper subject-matter of tithing. And with respect to

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all other species of nursery trees, which are bought in one parish, remain but a little time in a second, and are purchased by a customer living in a third, and frequently undergo a greater number of removals before they are ultimately planted for use; it is humbly conceived, that the respondent is not well-founded in contending, that they are subject to pay a full tenth of their whole value upon each removal from one parish to another.

3. It may possibly be said (for it has been relied on) that there was no evidence of the cultivation of these plants. If that be so, yet surely there was enough to have induced the court to have directed the proper officer to have inquired into and to have stated the nature of the culture, with the uncommonly heavy expence necessarily attending it, before they had proceeded to decree the payment of tithes. The bill (*inter alia*) demanded the tithes of pines, melons, grapes, hot-house plants, &c. the appellants resisted the demand, and insisted they were not tithable; the decree has nevertheless directed an account generally, and payment of all the species of tithe demanded. Supposing the court could not take judicial notice of that which all mankind knows, (which is a position not to be admitted, and untrue in many instances,) yet surely private knowledge of a notorious usage might have dictated an enquiry, which would have given judicial knowledge.

4. Because the decree, by directing an account generally, hath declared the respondent to be entitled to every tenth exotic plant, and to every tenth pine-apple and orange-tree, without the least regard to the original expence of purchase, which sometimes comes to a third, and often to half the expence for which, when ripened or brought to perfection, they are sold at the market, independent of the very large expence of hot-houses, an expence totally unknown in the cultivation of any of the predial tithes of this country; therefore it is humbly submitted, that the decree ought at least to have directed the officer in taking the account, to have made fair allowances for the very heavy expences peculiarly attending the cultivation of exotics, and not to have decreed an account generally, which, if so taken, must do apparent injustice to the appellants; wherefore the decree ought also, it is humbly contended, to be reversed or varied.

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The Case of the Respondent.

In the decree pronounced by the court of Exchequer in the original cause, all the parties have acquiesced, except the appellants, who seem to admit (what is most clearly proved in the cause by their own acts and declarations) that no agreement was made between any of them and Dr. *Waller*, which was or was not intended to be permanent during his incumbency, although they had severally

by their answers claimed the benefit of such an agreement, and have thought proper to appeal to the House, alleging in their petition of appeal, that they conceive themselves aggrieved by the decretal order of the court of Exchequer, inasmuch as it having been admitted, that the appellants had, by virtue of some agreement, paid to the said *James Waller* compositions for and in lieu of their respective tithes from *Michaelmas* 1771 to *Michaelmas* 1777 inclusive; that the said several notices in the pleadings in the cause mentioned to have been given for determining such compositions, and for taking the tithes in kind, were short and insufficient notices for that purpose; and that therefore the respondent's bill ought to have been dismissed, as against the appellants; but that supposing such notices were good and sufficient, yet that such part of the said decree is erroneous, as directs an account to be taken of what is due to the respondent from the appellants for tithes of pines, melons, and hot-house plants, green-house plants, exotic plants, shrubs, trees, or roots, purchased by them, and sold again without having made an increase in number, inasmuch as the appellants apprehend, that several of the said matters and things are not in their nature tithable, and that others of them are not tithable in kind; and that therefore the appellants conceive that the said decree is erroneous.

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But the respondent humbly insists that the said decree is just and right for the following (amongst other) reasons:

1. Because the principles upon which notice is required by law, in order to determine demises of lands or houses, or even of tithes, do not apply to cases of compositions paid for tithes, the payment of such compositions being only, it is apprehended, in consideration of law, a mode of rendering the tithes. The true ground upon which the law requires notice to determine such demises is the presumed intention of the parties, the law inferring from the obvious convenience of notice to the parties, that both intended, that if either should be desirous to determine the relation subsisting between [1226] them, he should give the other a reasonable notice of his purpose; but the law, considering compositions for tithes as being in all cases equal in value to the tithes compounded for, or rather as tithes rendered in value, though not in specie, deems it equally convenient to the party who is to account for the tithes to pay them in specie, as to render them in value, and cannot, therefore, consistently with its own principles, infer that the parties to such a contract (to render tithes in value and not in specie) intended that notice should be necessary to determine it, unless the parties express that intention in a written agreement.

2. Because the want of notice to determine compositions for

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tithes is not, in fact, attended with inconveniencies, which the law, by requiring it, meant to prevent in the case of landlords and tenants.

3. Because, though it has been urged that such notice is reasonably required, inasmuch as if the party who is to account for the tithes had received it, he might have changed the mode of cultivating the land which yields the tithes ; it is submitted, as an answer to such an argument, that notice admitted to be reasonable, would scarcely, in any case, be received for so long time before the determination of the composition, as to enable the party receiving it to change the mode of husbandry or culture, or the nature of the produce, if he had the power of changing it, which in most cases he has not ; in the present case, where the produce of nursery-grounds is raised in succession, year after year, notice admitted to be reasonable would not enable the nursery gardener to change the mode of cultivating the ground.

4. Because, though notice has been formerly stated to be reasonable, that the party receiving it may, if he shall think fit, suffer his lands to be wholly uncultivated, it is presumed that such an argument will not, in modern times, be offered to a court of justice.

5. Because it hath been settled by many decisions in former cases, that notice given one week, or at any time before the end of the year for which the composition was made, is notice fully sufficient in law.

6. Because, in fact, the appellants had sufficient notice, from what passed at some or one of the meetings holden previous to the time when the first written notice was given to them, as well as from the written notice or notices in fact given of the incumbent's intention to determine these compositions.

[1227] 7. Because, if the notices given were not sufficient, yet the appellants having severally insisted that these compositions could not be determined but with the incumbency of the vicar, have thereby disclaimed the only relation to the incumbent or his lessees, which could possibly entitle them to receive or require notice from either. By this adverse claim they have declared that notice is not necessary. Notice is not necessary to determine a tenancy at will, where the tenant sets up a title adverse to that of his landlord. If any of these temporary compositions had been pleaded as a *modus*, it is apprehended, upon the authority of an adjudged case, that the party pleading it as such could not avail himself of the want of notice to determine it ; and a plea of a permanent agreement, during incumbency, is as inconsistent with the relation which makes notice necessary, as a plea of a *modus* is. The appellants do not (and against the real truth so fully established by the evidence in these causes,

they could not) consider themselves as aggrieved by so much of this decree as proceeds upon the fact, that these compositions were only temporary.

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v.
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8. Because it is apprehended that pines, melons, hot-house plants, green-house plants, and exotic plants, shrubs, trees, or roots, purchased and sold again, without having made an increase in number, or which are raised in common gardens, or elsewhere, for sale in the market, are tithable in their nature, and tithable in kind.

9. Because it may be shewn, that the arguments which are drawn from the expence, difficulty, and artificial mode of raising these productions, and from the nature of the soil, climate, and places, in which they are produced, and are urged to prove that they are not tithable matters, or not tithable in kind, would equally serve to prove various other vegetable productions not tithable or not tithable in kind, which have always been admitted to be so; and would tend to prove, that the same productions might be reasonably deemed tithable in some parts of the kingdom, which could not be so considered in other parts of it, which would perhaps, in a great measure, serve to prove (if not much qualified) that most vegetable productions are not tithable matters.

10. Because, if exotics, as such, are not tithable matters in this country, (the vegetable productions of which are believed not to be indigenous, except in some few instances,) the land would scarcely yield any tithable matter.

11. Because, if it is inconvenient that productions of this sort, [1228] raised for sale in the market, should be deemed tithable, or tithable in kind, (which inconveniences in the present case the conduct of the appellants has occasioned, the incumbent having been always willing to accept a reasonable composition an acre,) such inconveniences can be remedied only by an act of the legislature, and cannot be removed by those who in their judicial characters and capacities are only to declare what the law now is.

12. Because it has been long settled, that plants, shrubs, trees, fruits, and roots, planted and raised in nurseries, and sold out again, without having made an increase, are tithable in kind; and it is reasonable that they should be so considered.

After hearing counsel upon the following preliminary point, "Whether the notice given was a sufficient notice to determine a composition for tithes;" Lord *Mansfield* addressed the House in the following manner:

My lords; in this case there was a composition from year to year, and that composition had continued for four, five, six, or seven years. The vicar gave the appellants notice upon the 8th September, A notice given on the 8th of September is not sufficient to determine a composition for tithes from year to year, the composition commencing on the 29th of September.

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to determine that composition, as from the *Michaelmas-day* following, for the ensuing year; and he brings his bill for tithes in kind for that year.

The first objection is, that he has not determined the agreement, because he has not given a reasonable notice; and if that objection is sufficient, there is an end of the cause: the bill must be dismissed; the decree must be reversed. The arguments to over-rule the objection are, "that no notice was necessary;" or, if it was, "that the parishioners had done something in this case that precludes them from making that objection;" for they have insisted upon the construction of the agreement (in general words, it is to accept a composition from year to year, without limiting any time). They have said, the true construction of that agreement is "*during his incumbency*." There arises another objection. "If you prevail, and it is not *during the incumbency*, you have not given sufficient notice;" then the objection is a question of law, whether reasonable notice has been given or not. And the counsel have been confined to that question; and they have not yet gotten to the merits of that point, which the noble lord has argued in some measure; they have not yet argued that. I am sorry your lordships cannot determine that point: I wish you could; but the objection to the payment of

[1229] tithes out of all these particulars, arises from the mode of cultivation. And it so happens, that on neither side have they gone into any proof of the cultivation; and at the bar they would not agree upon that point, if your lordships would have taken any agreement from them. So it was impossible to go into that question. Perhaps, in this particular case, the incumbent may not bring another bill; perhaps, others may not bring another bill; but in this state of it I will not say one word against the arguments the noble lord has used; nor will I insinuate that I think the decree right upon that point. I think there are many objections: they all arise out of the mode of cultivation; but the preliminary point is, whether the notice is sufficient? I will propose the following question to be put to the judges:

"Whether a notice given upon the 8th of *September* be a sufficient notice to determine a composition for tithes from year to year, such year commencing upon the 29th of *September*?"

The question was put to the judges.

Mr. Justice Gould.—The question is, "Whether a notice given upon the 8th of *September* is sufficient to determine a composition for tithes from year to year, such year commencing on the 29th of *September*?"

My lords;

I have conferred with all the rest of my brethren that are here, and they all concur in one and the same opinion which I have the

honour to deliver to your lordships, "That such a notice is by no means sufficient to determine such a contract." — Decree reversed. (a)

1781.

Adams
v.
Waller.

P. 21 Geo. III. A. D. 1781. B. R.

Franklin v. Holmes, Clerk. [MS.]

THIS was an action tried before Mr. J. Heath at the last assizes for Oxford, and on motion for a new trial the report stated that the pleadings contained three issues. The first issue was to try whether one *John Pearce* and all his ancestors, whose heir he then was, from time immemorial had been used to pay to the king and his royal predecessors the tenths of the rectory of *Warpsgrave*, and that in consideration thereof the said *John Pearce* and all his ancestors, &c. had received and taken to his and their own use all and singular the tithes both great and small arising within the said parish of *Warpsgrave*.

S. C. Serj. Hill's MSS. vol. 20. p. 123. Upon an issue directed by a court of law to try the existence of a right, the judge may indorse a different

right from that alleged on the pleadings, if the jury find it, without a special order for that purpose.

The second issue was to try, whether by some ancient real composition the owners or occupiers of lands within the said parish had from the making of such real composition paid the owners of the said tithes the sum of 20*l.* in lieu and compensation thereof.

[1230] Qu. Whether a grant before the disabling statute may be presumed to prove a real composition. — Sir H. Gwill.

The third issue was to try, whether an ancient *modus* or prescription of 20*l.* was in like manner paid and payable for the said tithes.

Semble, not without producing the deed or evidence that it has existed. — Ed. See *Fanshaw v. Rotheram*, supra 1177. *Scott v. Airey*, supra 1174. *Smith v. Goddard*, supra 1122. * Supra 385.

At the outset of the cause the judge started an objection, that the first count being for the payment of tithes in kind, was inconsistent with the two other counts, and that the counsel for the plaintiff should make his election on which he would proceed. But, after this point had been argued, on consideration, he was convinced that the objection was not well founded, and therefore waived it. And though he was of opinion at the time of the trial, that *John Pearce* being a layman could not make title to the tithe in question either by prescription or *modus* according to the doctrine laid down in *Slade v. Drake*, *Hob.* 297.* yet, as these objections appeared on the record, he permitted the counsel for the plaintiff to bring proof in support of all the issues. The counsel entirely abandoned the third issue, and acknowledged he could not support the first issue, unless the judge would indorse on the *postea* another right (which in his apprehension differed materially from the prescription laid in the declaration) if the jury should find it. But, as there was no order for that purpose, the judge refused, under the circumstances of the

(a) On the point of notice, see *Glasse v. Caldwell*, supra 1030. n., where the cases are collected; On tithes of hot-house fruits, and green-house plants, see *Worral v. Miller*, &c. Toller on Tithes, 124, *infra*, *seems*. See also Comyn's L. of Landlord and Tenant, 265.

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v.
Holmes.

case, to comply with the request. The counsel then opened his evidence in support of the real composition, which he offered to maintain by the testimony of witnesses in such manner as prescriptive rights are usually proved. After he had finished his opening, the judge asked him whether he had any evidence, other than the proof of payment by the testimony of living witnesses, whence a presumption might arise, or an inference be drawn, that the composition in question existed before the restraining statute of 13 *Eliz.*; and on his answering in the negative, the plaintiff was nonsuited.

[1231]
Supra 1122.

Howarth, Morris, and Bearcroft, of counsel for the defendant, contended, that the first issue was bad upon the face of it, and that it was impossible to support it: that there could not be such a prescriptive title as was there assumed, because the tenths were not given to the crown till long since time of memory, till the statute of *H. 8.* They insisted further, that there could not be a legal commencement of a contract to pay a part, as the tenths were in lieu of the whole: that a rector too cannot be personally discharged from the tenths. *Morris* cited the case of *Smith v. Goddard* in the Exchequer; in which, he said, he first put in an answer insisting on a *modus*: that he afterwards stated it as a composition real; but that the court would not let him change his defence in that way, but made him stick to the *modus*.

Lord Mansfield.—None of the issues were tried. The reason why the second was not tried is, that they cannot prove a real composition by presuming a grant before 13 *Eliz.* But I am not satisfied of that. The judge thought he could not indorse a different custom, where an issue is directed without an order. It ought to be indorsed, and *valeat quantum valere potest*.

A rule for a new trial made absolute.

P. 21 Geo. III. A. D. 1781. Scac.

James Jackson, Clerk, v. Thomas Walker, William Moore Newnham, John Bishop of Oxford, and Robt. Allen. [Sir J. Skynner's MSS.]

S. C.

4 Wood's
Decr. 181.
by the name
of Jackson
v. Wood-
roffe.

Where no
endowment
is forth-
coming, but
the vicar
has been
used to re-
ceive such
small tithes

LORD C. B.—The bill in this cause is brought by the plaintiff, who is vicar of *Farnham* in the county of *Surry*, for an account of the tithe of hops. The defendants *Walker* and *Newnham* are the executors of *George Woodroffe*, esq., who was lessee of the rectory under the defendant the bishop of *Oxford*, as archdeacon of *Surry*, to which dignity it is annexed; the defendant *Allen* is an occupier.

The bill was originally brought against Mr. *Woodroffe* the lessee, and prayed to establish the right. But it being revived against his executors only, and the lease appearing to have been made to him and his heirs, that part of the relief is out of the question; and the bishop of *Oxford* is become an unnecessary party.

The plaintiff claims by *prescription* or *endowment*; he may entitle himself under *either*. Though no endowment appears, yet evidence which will not support a *prescription* may be brought to prove an *endowment*. Endowments of vicarages have been in *general*, if not *all* of them, made since time of legal memory. Many of them are lost, and can only be proved by usage. It would be unreasonable to expect in such cases proof of a prescriptive right; for in many instances it would defeat the vicar's title. And if the vicar is permitted to supply the want of an endowment by such evidence of usage as will not support a prescription, the rector must be permitted to oppose the vicar's claim of a prescriptive right, either by offering evidence which proves an endowment, or by shewing that the vicar's evidence adduced to support a prescriptive right applies to an endowment, not to a prescription.

Consider the evidence in the present case: there is no dispute about the facts; the question arises on the application of them. The vicar has received tithe of wood, and all small tithes, except of hops; which tithe has been divided between the vicar and rector. Tithe of hops in gardens, orchards, and coppice grounds, has been taken by the vicar; in the other places of the parish by the rector, who has likewise received tithe of corn, grain, and hay. The vicar insists, that he is entitled to tithe of hops, as a small tithe; for he insists, that, whether the usage is proof of a prescription or an endowment, it proves a right in the vicar to *all* small tithes, antecedent to the introduction of hops into the parish; which, as he collects from the evidence, was in the time of queen *Elizabeth*, and subsequent to the disabling statute: that the same construction must now be made as would have been made on the vicar's evidence at the time of the introduction of hops into the parish, at which time the vicar had received *all* small tithes and that where the vicar has been used to receive *all* small tithes, which have arisen in a parish, and a new tithable matter is introduced, if it is a small tithe, and there is no actual endowment, the vicar is entitled to it.

It is true, that where there is no endowment existing, and the vicar has been used to receive all the small tithes which have arisen, it is to be presumed that he is endowed of *all* small tithes; and, consequently, when a new tithable matter arises within the parish, it shall be presumed to have been comprised within the endowment: for that is the natural and necessary presumption which arises from such a usage, where no endowment appears.

But, whether that rule would have applied to the vicar's claim, if his claim had been made at the time of the actual introduction of hops into the parish, must have depended on the evidence which might at that time have been produced. For at that time perhaps the endowment itself actually existed. It is certain that an

1781.

Jackson
v.
Walker.

as have in fact arisen, it shall be presumed that he was endowed of all small tithes arising and to arise, and therefore to tithes of [1232] articles of recent introduction. Where no endowment appears, evidence which will not support a prescription may be adduced to prove an endowment; and the endowment will then be construed according to the usage. A vicar held entitled to tithes of hops in gardens, but not to those of hops grown in fields, where he could not produce an endowment, or evidence of it giving *all* tithes, and the usage as to that article grown in fields was against him.

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v.
Walker.

[1233]

endowment might then exist, either an original endowment, or an augmentation including specifically the tithe of hops, consistent with the usage which has since prevailed. I admit that the instrument of 1331 does not prove that the vicarage was not then endowed. For, as it has been truly said, the suggestions in a citation (and that instrument amounts to no more) are not proof of the facts suggested. It must likewise be admitted, that it does not appear, from any evidence in this cause, that the vicarage had been then endowed; or, if not, at what time afterwards it became so. What then is the presumption which naturally and necessarily arises from the usage in this parish? It is not that the vicar has, from time beyond memory, that is, by *prescription*, been entitled to *all* small tithes; for that is contrary to the usage by which the rector has continually received a part: it is not that the *endowment* comprized *all* small tithes; for that is equally contrary to the usage: but the more natural presumption, because conformable to the continual usage, is, that the endowment itself was made, or some augmentation or modification of it, when by law it might, and when the introduction of hops, if not into the parish, yet into the country around it, made that species of tithable matter an object worthy of particular attention. For certain it is, that before the disabling statute of 13 *Eliz.* the cultivation of hops was greatly increasing. Whether they were introduced into this parish before or after that time cannot be collected with certainty, from any evidence in this cause. The account is only by tradition. And the rector and his lessee say in their answers, that they believe it will appear by depositions of witnesses, that they were first planted *in fields* there in 1586; but no such depositions, as are referred to, have been read in evidence. But, if the fact really was, that the increase of them had made such a progress in the parish in the 28th year of that reign, as that they were then planted *in fields* there, it is highly probable that before the 13th year of it, and, consequently, before the time when the final adjustment of the vicar's rights might have taken place there, they had found their way into *this* parish, as they did at first into *others*, by being planted in *gardens*. If that was the case, or even if they were become an object of attention there, though not actually introduced into the parish, when the final adjustment was made, a distribution of this particular species of tithe, conformable to the usage which has prevailed, was very obvious and natural; by which the vicar was to have all small tithes, with an exception or restriction of his right as to this new tithable matter: so much of which as should thereafter be planted in gardens, orchards, and coppice ground, which had used to yield tithe to the vicar, was to be tithable to him; and so much of it as should be planted in the open fields or places, which used to produce corn

and grain, and which had yielded tithe to the rector, should be tithable to him.

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Jackson

v.

Walker.

*[1234]

* If an endowment can be presumed, which is conformable to the usage, it is the duty of the court in the case of a usage, long and uninterrupted as the present is, to presume such an endowment. It has been at all times the rule of the court, where no endowment has appeared, to transcribe, as was pointedly said at the bar, the usage into an endowment, if it can be done. This rule must be applied with equal regard and attention to the claims of the rector as to those of the vicar. And therefore all those cases which have been cited as authorities in the argument of the present question, to support the vicar's claim, are equally authorities in support of the rector's claim, if the usage has been in favour of it. For let those cases be considered. The first is the case of *Franklin v. The Mas-*

Supra 629.

ter and Brethren of St. Cross, which was cited from *Bunb.* 78. According to the report of the case in that book, the vicar was endowed generally of the small tithes. It was decreed, that he was thereby entitled to tithe of hops, though of growth since the endowment. If an endowment was produced, and it comprized all small tithes, there could be no question. For the tithe of hops being a small tithe, whenever hops were introduced it must fall within it. But, in fact, the case was otherwise. The endowment, which bore date in 1440, did not in terms comprize *all* small tithes. It endowed the vicar with the *altarage*. He had been used to receive *all* small tithes, and among them, tithe of hops, since their introduction into the parish, which had been for about twenty years. Under these circumstances, so favourable to the vicar's claim, the court did not, on the hearing of the cause, decree for him as to the article of hops; but directed a case to be stated and argued before them.

What was the final determination upon that point, or whether any determination upon it was ever made, does not appear. And yet the merits of the question seem clearly to have been in his favour, as he was endowed of *altarage*, and had been used to receive *all* small tithes. In the case of *Wallis v. Pain and Underhill*, *Com.* 633., the

Supra 749.

question was merely whether clover-seed was a great or small tithe. For the vicar was clearly entitled to it, if a small tithe. And the usage as to that species of tithe was in favour of the vicar, whose predecessors had received it for fifty years. In the case of the *Vicar of Kellington v. Trinity College in Cambridge*, which was in 1747, and is reported in *Wils.* 170.; though the endowment did not appear,

Supra 799.

yet it appeared from the survey of *Hen.* 8. that the vicar was entitled to *all* small tithes. And though the impropiator had received agistment-tithe for fifty years; yet, before that time, it had been paid to the vicar. In delivering the opinion of the court, Lord Ch. Baron *Parker* expressed himself in terms which apply very strongly to

[1235]

1781.

Jackson
v.
Walker.

affords the strongest ground to presume that they had likewise become an object of particular attention *there* before that time, and before the final division of the tithes between the rector and the vicar had taken place. Such a presumption supposes the usage to have taken its rise from a clear right, and not from any mistake. It is therefore such a presumption as it is the duty of the court to make. And the consequence of it is, that the tithe in question appearing to the court to belong to the rector, or his lessee, the vicar's bill must be dismissed.

P. 21 Geo. III. A. D. 1781. Scac.

Travis v. Chaloner and others. [MS.]

S. C.

4 Wood's
Decr. 201.
Qu. Whether evi-
dence of a
general
right can
be applied
in support
of an alle-
gation of a
partial
right.

[1238]

A verdict
between the
parson and
one occu-
pier is evi-
dence in a
case upon
the like
point be-
tween the
parson and
another oc-
cupier.

THE plaintiff by his bill claimed tithes in kind of the defendants as occupiers of lands in the townships of *Great Sutton* and *Little Sutton* in the parish of *Eastham* in *Cheshire*. The bill alleged the plaintiff's title thus; "that he was vicar of the parish, and as such entitled by endowment, prescription, usage, or otherwise, to the tithes in question in the townships of *Great Sutton* and *Little Sutton* in the parish of *Eastham*, and the tithable places thereof." In support of this allegation proof was offered of the payment of tithe-hay in all other parts of the parish, *viz.* in kind where no tilth-penny, and a tilth-penny where none in kind. But it was objected, that this proof was not admissible in support of this allegation; for that this was evidence of a general right throughout the parish, whereas the allegation was of a different right, namely, a portion of tithes in the townships named, and that the defendants might by such means be misled into a defence against a title very different from the title alleged by the plaintiff. The objection thus shaped was made by the court, though started in a somewhat different form by Mr. *Maddocks*. There being other evidence, *viz.* of terriers, rentals, &c. the plaintiff was permitted to go on with that, and the discussion of the objection reserved as matter of general importance. (a) Afterwards on the same day was discovered and determined a point of evidence, *viz.* whether a verdict which had been given between the same vicar and other occupiers on the question, "whether the payment called the tilth-penny was paid and payable in lieu of tithe-hay," in which the affirmative was found, was admissible evidence in this cause. The objection was, "*res inter alios acta*:" but the court said, that in these cases a decision between the vicar and one occupier was evidence in a case between the vicar and another occupier, and to exclude the evidence would end in

(a) The court gave judgement in favour of the plaintiff without disposing of this objection, there being other evidence in the cause sufficient to ground their determination.

the exclusion of nine-tenths of the evidence in this and all similar causes: but that the evidence was at the same time open to all imputation of fraud, collusion, mistake, &c.-(a)

1781.

Travis
v.
Chaloner.

M. 22 Geo. III. A.D. 1781. Scac.

Ashby v. Power. [MS.]

KENTON for the plaintiff. — This is an original bill by the rector of *Barwell* in *Lancashire*, now revived by his executrix, for subtraction of the tithes of grain, peas, beans, and hay. There is no controversy respecting his character of rector: the occupation and tithable matters are also admitted. The defence is, *moduses*. It is allowed that money payments have been long paid, but we insist they are rank. Few of these payments are less than 1s. an acre: many of them above that sum. They must therefore have been only temporary compositions within time of memory. Besides, these payments taken together amount to 300*l.* *per annum* (b), whereas the value of the living in 26 *H. 8.* in the *Liber Valorum* appears to be only 21*l.* 16s. It is not expedient that a fact so clear should be sent to the prejudices, not the judgement of a jury. Besides this, a bill was filed in 1680 odd by the rector against an occupier, where the occupier set up a *modus* different from the present. There is likewise a terrier of 1697 stating the rector to be entitled to all tithes great and small, and making mention of a rate-tithe of 40s. in one district, whence we infer that no such existed in the rest of the parish.

S.C.
4 Wood's
Decr. 195.

Issues directed to try *moduses* altogether amounting to 67*l.*, though the value of the living in 26 *Hen. 8.* appeared not to be above one-third of the value.

*[1239]

[On the offer to read the above bill and answer, it was objected that nothing appeared to have been done in consequence of the answer, and the lands could not be identified. But this was answered by saying that there was evidence to shew that the whole of the now defendant's lands were in the occupation of the former defendant. And the court held it to be admissible, if the lands could be identified. Depositions were read for that purpose; but these being too loose, the answer was rejected. — To shew the magnitude of the present value, the plaintiff gave evidence of assessments of the tithe to the poor rates, which on debate was admitted: but the assessments from some townships only being produced, it amounted to nothing.]

A former bill and answer relating to a *modus* is admissible evidence between a rector and occupier, if shewn to relate to the same lands.

Arden S. S. insisted on the valuation in the time of *H. 8.*; which, though not to be construed with great strictness, was here decisive

(a) There had been no less than four suits in less than ten years, previously by the same incumbent against different occupiers in the parish. *Travis v. Gill*, 3 Wood's Decr. 372. *Travis v. Mason*, *id.* 531. *Travis v. Oxton*, *id.* 523. *supra* 1066. *Travis v. Stanley*, 4 Wood's Decr. 82.

(b) By the Decree-book it appears that the bill stated that the profits of the rectory were *communibus annis* upwards of 320*l.* The compositions or *moduses* amounted to 67*l.*, as stated by Mr. *Arden* and the court.

1781.

Ashby
v.
Power.

where the *moduses* amount to 67*l.* None of the receipts state the payments to be *moduses*. Here is nothing but the belief of the witnesses that the payments were immemorially paid: they are not said either to be paid or accepted as *moduses*. One defendant pays at the rate of 10½*d.*, several at 1*s.* and upwards, some at 2*s.* No tithe having been taken is a proof that the rector has generally let his tithe. We therefore pray a decree without an issue. We desire no other indulgence to the church than is shewn to laymen. In the case of a layman, a payment of rent is presumed to be for a tenancy at will, or from year to year, unless the contrary be proved; so ought it to be presumed in this case, that the payments to the rector were temporary, determinable payments, and not *moduses*, unless proved to be such.

Hill Serj. contr. insisted, that even an issue ought not to be directed in this case, but that the bill should be dismissed. The rector accepted the payments twenty years together, gave notice before *Michaelmas* 1776, filed his bill for tithe due *Michaelmas* 1777, and [1240] died in 1778. Will then the court admit an executrix to bring this bill, and have issues for the difference between the value of

Supra 802.

one year's tithe and the money payments? In *Richards v. Evans*, 1 *Ves.* 40., Lord *Hardwicke* said he would have dismissed the bill if no cross-bill had been filed: but this case is far more oppressive and vexatious, and more fit for dismissal than that case. But, if the court should not be disposed to dismiss the bill, at least issues are proper. The payments are only objectionable on the score of rankness: but that is an objection of fact proper for the determination of a jury. *Giffard v. Webbe* *, *Poole v. Gardiner* †, *Sansom v. Shaw* ‡, and *Twells v. Welby* §, are all authorities to this point. Rankness is only evidence of the non-existence of the *modus* from time immemorial; for if there were proof that it had so existed, the *modus* would be good, however large it might be. As to the valuations, they are of no force: there were two valuations; one in the 19 & 20 *E.* 1., some mistakingly call it the 29 *E.* 1., the other in the 26 *H.* 8. Now the valuation in 19 & 20 *E.* 1. is 24*l.*, though the other is 21*l.* The great variety in the coin of this kingdom is one strong reason against giving much weight to apparent rankness; for a pound formerly was a lb. weight. A mark was of different value in different periods. Lord *Coke*, in his comment on the statute of *Gloster*, says 40*s.* was then something more than three times what it is now. At the time of the second valuation there were 48*s.* to the pound; at the time of the first, 20*s.*; so that in the time of *E.* 1. the valuation was in effect returned double as high as in *H.* 8.'s valuation. This proves the valuation of *H.* 8. to be greatly below the real value. The clergy understanding, the design of the valuation, took care to have the value much under-rated.

* Supra
708.

† Supra
601.

‡ Supra
806.

§ Supra
1192.

So, on the suppression of the monasteries, the rating was extremely low. So were the rents: there are many instances of the letting out on old leases at 35, 45, and 55*l.*, yet the valuation of *H. 8.* only at 5*l.* Perhaps too the present value may arise from bequests to the rectory since the time of *H. 8.* That valuation in truth affords no rule even for probable conjecture. It is objected, that the witnesses do not prove the payments to be *moduses*: but they prove the antiquity of those payments, and their opinion of them. The subject-matter will only admit of belief: nothing further can ever be sworn with propriety. It is objected, too, that the receipts do not call these payments *moduses*: but the parishioners cannot compel the rector to call them so, and to keep evidence of payments they must be content to take any the rector will give. A similar objection was over-ruled in *Chapman v. Smith*, 2 *Ves.* 506. It is objected, that the farms for which, &c. are ancient farms; but there is such evidence. The terrier is very slight: only signed by two inhabitants, and those two in one hand-writing.

1781.

Ashby
v.
Power.

[1241]
Supra 847.

Arden in reply. — As to the case of *Richards v. Evans*, which was cited to shew that the bill ought to be dismissed, it is observable, that in that case there was the rector's own admission of the immemoriality of the payment. Nor is there any case in fact where a bill has been dismissed, where the *modus* was contested by the plaintiff, and he was willing to try it at law. And the present plaintiff has no remedy elsewhere for much of her demand. In *Carte v. Ball*, 1 *Ves.* 3., a bill was brought by the administrator of a vicar, who had never pretended a right to the tithes in kind, and yet the bill was not dismissed. As to the merits, it is true that rankness is matter of fact, not of law; that is, it is evidence of non-immemoriality. But this is not a case of payment of so much an acre in a part of the parish, but of particular sums for particular farms. Now, though I admit the *valor* not to be precisely accurate, yet it is impossible there could be such a variance. And as to the survey of pope *Nicholas*, though it be 3*l.* less than that of *H. 8.*, yet still the *modus* could not then exist; that is, 67*l.* could not be paid as a part of 21*l.* any more than as a part of 24*l.* As to the difference of the valuation impeaching the accuracy of the surveys, it has no such effect; for *non constat* that *ecclesia de Barwell* at the two periods consisted wholly of the same particulars. It must be admitted, according to the case of *Chapman v. Smith*, that the receipts not calling it a *modus* is not conclusive, because the parishioners cannot oblige the rector to call it any thing, or give any receipt at all: but the parishioners are not obliged to take a receipt making against them, and therefore when accepted it furnishes a strong inference. It has been said that the terrier proves but little; but this will be found upon examination to be clearly otherwise,

Supra 797.

1781. and that it proves a great deal. It has been said, that there is no case where issues have been refused upon a farm *modus*: but *Ekins v. Piggott*, 3 *Atk.* 298.*, is a strong case against this proposition: in that case lord *Hardwicke* decreed for tithes without directing an issue, on account of the rankness of the *modus*, the *modus* alleged being 48*l.*, and the manor at the then present time being only worth 80*l. per annum*. As to the receipts, in one it is expressed to be for two quarters, whereas the *modus* alleged is a half-yearly *modus*: again, the receipt describes it as due at *St. Thomas's Day*, whereas the *modus* alleged was due at *Lady-day* and *Michaelmas-day*. As to the parol evidence, the evidence of *Power's*, which is the strongest, only proves his opinion of the payment. There is not a tittle of evidence of universal reputation.

[1242]

Ashby
v.
Power.
• *Supra*
783.

Lord C. B. — The defendants set up several immemorial payments. The immemoriality of these payments has been questioned from their magnitude and apparent rankness, and also from the evidence of the terrier, which states all tithes both great and small to be due in particular lordships, and likewise specifies some rate-tithes; and further from the survey, whereby the value appeared to be only 20*l.* 5*s.* 7*d.*, not one-third of the *moduses* now claimed for part of the parish only. But neither of these afford conclusive evidence of the value of the living: they are *media* of proof affording inference, and therefore proper for the consideration of a jury, if the other evidence in favour of the payment be strong enough to lay a case for issues. The evidence as to distinct parcels is not equally strong. As to *Powers's modus*, there are receipts to 1723, and by succeeding rectors to 1776. Those indeed of the last rector are for two quarters, the others being for half years. But this difference is not sufficient to prevent them from being sent to an issue. His lordship therefore directed issues as to those *moduses*, where the sums in the receipts were the same, and the land could be identified; and an account as to those where the payments had varied and were inconsistent with the *moduses*, or where the land as to old payments could not be identified. (a)

Tr. 22 Geo. III. A. D. 1782. Scac.

Willis, Clerk, v. *Fowler* and others. [MS.]

S. C.
4 Wood's
Decr. 212.
Qu. Whether the
court will,
without the

THIS was a bill for an account of tithe-hay. The defendants, the occupiers, allege, that their lands are covered by a *modus* of four-pence a yard-land, stating that such a *modus* has immemorially obtained for all the lands (except certain described lands) lying on the eastern side of an ancient road (describing it) running

(a) See also *O'Connor v. Cook*, 6 *Ves.* 665. 7 *Ves.* 535. *infra*.

through the western part of the parish, and alleging their lands to lie within such *modus* district. The plaintiff objected, that the *modus* was ill laid, because it did not state what was payable for any quantity less than a yard-land. It was urged in answer, that all the defendants except two appeared to occupy whole yard-lands, *and of those two, one a half, and one three-quarters of a yard-land. That it ought to be presumed that proportionable parts are payable for broken yard-lands; and that the issue might well be directed; as the usual liberty to indorse on the *postea* would enable the verdict to be returned to the court in a satisfactory manner: or the court might direct the issue with the additional words of "so in proportion," or the like; or the defendants might, according to the late practice, be permitted to amend their answer in this particular. The court intimated a disinclination to allow the amendment, saying, that it had never been done without consent, and that the late indulgences as to such amendments had led to some inconveniences, which had made them somewhat repent of introducing the practice, and would make them cautious in granting such indulgences for the future. As to directing the issue more complete than the allegation, that they denied to be usual except as to trifling particulars, where the evidence in the cause authorized the alteration, such as where the defendant alleged a *modus* payable quarterly, and the evidence proved payments half-yearly; there, the issue was alleged on a *modus* payable half-yearly. As to the effect of the indorsement on the *postea*, the court said it had never been the practice to direct an issue on a *modus* bad upon the face of it, because it might happen that the jury would find the verdict for the *modus* without more, and then a *modus* would be found on which the court could make no decree. But on inquiry as to the real fact, (on which the evidence threw no light,) and the solicitors being uninstructed, and because the question related to a considerable district, it was proposed by the court, and agreed to by the parties, that the cause should stand over in order to obtain better instructions as to the fact. Afterwards in *Trinity* term the inquiry having been made, the court were informed that the payments had in fact been in proportion to the fractions of a yard-land, that is, two-pence for half and one penny for a quarter. Leave was therefore given (*by consent*) to amend the answer immediately, and an issue was directed according to the allegation so amended. (a)

1781.

Willis

v.

Fowler.

consent of the parties, amend an answer stating a pecuniary payment of so much for a yard-land, but omitting to state the sum payable for a fractional part of the yard-land.

*[1243]

(a) The answer was also permitted to be amended in *Berney v. Harvey*, *supra* 674., and *Philips v. Prytherick*, *supra* 1125.; but it is contrary to modern practice. 1 Newl. 139. Cooper's

Equ. Plead. 337. Lord Redesd. Cha. Plead. 262. 264. In the present case the answer was amended without oath. 4 Wood's Decr. 214.

1781.

Tr. 22 Geo. III. A.D. 1782. Scac.

Oglander

v.

Lord Pomfret.

S.C.

4 Wood's

Decr. 219.

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endowment

gave him

all tithes in

the parish,

"*decimis**garbarum**duntaxat**exceptis.*"*Oglander v. Lord Pomfret.* [Eyre's MS.]

THE bill stated, that the warden and the scholars of *New College* in *Oxford* were impropriators of *East Neston* and *Hulcot* in *Northamptonshire*, and entitled to the tithes of corn, grain, and hay yearly arising throughout the said parish; that by indenture dated the 19th of *December* 1707, they demised the same to lord *Lempster*, afterwards earl of *Pomfret*, for ten years, at four pounds a year; that he entered thereupon, and took the tithes thereof as aforesaid to his death in 1753; that his son then entered, and had ever since received the same, as lessee of the college, up to *Michaelmas* 1778; that the said earl had been for some years past the owner of all or most of the lands in the parish; that particularly in *December* 1778 he occupied divers parts of them; and that the defendants, as tenants to him, held the remainder; that the plaintiffs being minded to take in kind the tithes arising from the lands in the defendants' occupation, gave them respectively due notices in writing, that after the expiration of the year 1778, the plaintiffs would take their tithes of hay, corn, and grain in kind. The bill then charged, that the defendants respectively in 1779 had reaped, mowed, and taken upon and from off the said lands wheat, barley, oats, rye, peas, beans, and hay. The bill further charged, that the plaintiffs, as impropriators, on the 3d of *December* 1777, gave the earl of *Pomfret* notice in writing to quit and yield up to them upon the 10th of *October* then next the said rectory and premises and all the tithes of corn, grain, and hay, growing in *East Neston* and *Hulcot*, or elsewhere, to the said rectory belonging; that he persisted in refusing to account with them, or make any satisfaction; and that he had forbidden the defendants the tenants to account. The bill further stated, that the defendant *Lawford* claimed to be entitled, as vicar, to the tithe of hay arising in the parish. The bill then prayed, that the defendants might account for the single value of the tithes of the corn, grain, and hay, which they respectively had taken from off their said lands, and pay what should appear to be due on such account.

[1245] The defendant *T. Inns* and others said, that they knew not of the lease in the bill mentioned, or by what tenure earl *Pomfret* held the tithes; but that the lands by them holden in the parish of *East Neston* were either exempted from the payment of any tithes whatsoever, or the tithes thereof had been purchased by the earl's ancestors, and the occupation of the lands granted tithe-free; for that no species of tithes had been demanded of them for the said lands until the delivery of the said notices on the 12th of *December* 1778, and the 5th of *November* 1779. They admitted, that the earl had

desired them to set out their tithes of corn and grain for 1780, and for all future years; but denied that the plaintiffs had any right to the tithes of hay or grass arising on their said lands.

1782.

Oglander
v.
Lord
Pomfret.

The defendant the earl of *Pomfret* denied that the plaintiffs were, to his knowledge, impropriators of the rectory, and entitled to the tithes of corn and grain; and said that the vicar was entitled to all tithes, except the tithes of corn and grain. He also denied all knowledge of the lease dated the 19th of *December* 1707; and insisted, that if any such lease had been granted to lord *Lempster*, he had received the tithes of hay by virtue thereof. He admitted, that after the death of lord *Lempster* in 1711, and of his, this defendant's father, he had entered upon the said rectory, and had received all the tithes of corn and grain belonging thereto, as the tenant of the plaintiffs, at a yearly rent from 11*l.* to 15*l.* according to the price of corn at *Oxford* market, and that he did not hold the same upon the terms mentioned in the bill; and he averred, that he had paid his rents to the plaintiffs up to *Michaelmas* 1778. He also admitted, that for several years past he had been owner of all or most of the lands in the parish; that in *December* 1778 he occupied several acres of his lands; that the plaintiffs caused the notice to be delivered to him as stated in the bill; that in 1779 he occupied several acres of meadow land, and grew and cut thereon hay, but no corn or grain: and he submitted to make the plaintiffs a satisfaction for the value of the said tithes of hay, in case they were entitled to the same. He admitted that the plaintiffs, about the 3d of *December* 1777, caused such notice to be given to him as stated in the bill; but denied that he had entered into any negotiation for a renewal of the said lease; and said, that he had considered such notice as one to set out his tithes of hay, corn, and grain in kind, after the 10th of *October* next ensuing the date of the same.

The defendant *Lawford* said that the plaintiffs were seised of the impropriate rectory, and entitled to receive the tithes of corn and grain throughout the parish; but denied that they were entitled to receive the tithes of hay therein; and insisted that he, as vicar, [1246] was entitled, by endowment, prescription, or usage, to the tithes of hay, and to all other tithes whatsoever arising throughout the said parish, except the tithes of corn and grain.

The plaintiffs replied, the defendants rejoined, and witnesses were examined on the part of the plaintiffs only.

Lord Chief Baron. — In this case the general title to the rectory is not controverted; so that the common law right is with the plaintiffs as to the tithe of hay. But the vicar claims this species of tithe under an endowment which gives him all the tithes in the parish, *decimis garbarum duntaxat exceptis*. “ *Consistit etiam in*

1782.

Oglander
v.
Lord
Pomfret.

omnimodis decimis ad dict. eccl. provenient decim. garbarum duntaxat except." The word *garba* may be taken in an enlarged or a limited sense, according to usage. The plaintiffs have given evidence of the perception of this species of tithe by the rector. For by the minister's accounts in 1536, and 1539, which have been produced, tithe of hay was in charge as belonging to the rectory, parcel of the possessions of the dissolved monastery of *Sewardesley* in the county of *Northampton*. In 1537 the rectory was demised by the crown to one *J. Brooke*. In 1550 king *Edw. 6.* granted the rectory to two persons, of the names of *Rogers* and *Veale*, with general words; and under that grant the plaintiffs derive their title.

It appears that the ancestors of the defendant lord *Pomfret* were farmers of the rectory under the plaintiffs at an old rent, part in money, and part a corn rent; but there has been no perception by them of the tithe of hay in kind; for lord *Pomfret* and his ancestors have been owners of almost all the lands in the parish, and have demised them to their tenants tithe free. This puts then lord *Pomfret*, the plaintiffs' tenant, in possession of the tithe of hay. This therefore is an enjoyment of that species of tithe by the plaintiffs themselves. To encounter this there is no evidence on the vicar's part of enjoyment; nor has he any title, unless the necessary construction of the endowment give him a title. But there can be no such necessary construction as against the usage, because it depends upon words of doubtful sense, which the usage is to fix; and here the usage has fixed a sense on them against the vicar. (a)

[1247]

P. 23 Geo. III. A. D. 1783. Scac.

Payne v. Powlett. [MS.]

S.C.

4 Wood's
Decr. 233.

Where
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THE vicar of *Buckland Newton*, otherwise *Buckland Abbas*, in the county of *Dorset*, claimed the small tithes arising therein, and stated that the defendants, the dean and chapter of *Wells*, were impropriators of the rectory, and entitled to the tithes of corn, grain, hay, and wood; that they being so entitled, did, before 1770, lease the same to the defendant *Anne Powlett*; that since the said year, many of the landholders in the parish, and particularly the defendant *Pople*, had sown their lands with clover and other grass-seeds, which they had threshed for seed; that the tithe thereof being a small tithe ought to have been paid to the plaintiff as vicar; but that the lessee of the rectory had, since the said year, received the said tithes of clover seeds and other seeds, and pre-

(a) See *Barsdale v. Smith*, Cro. Eliz. 633, *supra* 207.

tended that he was entitled thereto, as lessee as aforesaid. The bill therefore prayed, that the plaintiff's right to the said tithes might be established; that the defendant *H. Pople* might pay him the said tithe which had become due since the year 1770; and that the defendant *Powlett* might repay him for all the tithe of seed he had since the said year received from any of the landholders in the parish.

1783.

Payne
v.
Powlett.

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The dean and chapter of *Wells* said, that they were impropriators of the rectory, and entitled to all tithes whatsoever thereto belonging, and also to the right of presentation to the vicarage; that the same, before the year 1770, had been in lease to the defendant *Powlett*; that the vicarage was many years since endowed with some of the tithes arising within the parish; that the plaintiff was, in 1766, duly presented thereto, and had, by himself and curate, performed the duties thereof; that the defendant *Powlett* claimed, by virtue of the lease of the said rectory impropriate, to be entitled to the tithes of all clover and grass-seeds, as part of the tithes belonging to such rectory; that he had received such tithes, or some satisfaction for the same, from all or most of the occupiers of lands in the parish; but that, as they had never received the tithes belonging to the rectory, they could not say whether such kind of tithes belonged to them as rectors, to the defendant *Powlett* as their lessee, or to the plaintiff as vicar; and that they therefore left the plaintiff to make such proof as he should be able in support of his claim; but they insisted that they, as rectors, or their lessees, were entitled to such tithes, unless the plaintiff should make out a right thereto in a legal and proper manner.

[1248]

The defendant *Anne Powlett* denied that the vicar was entitled to all small tithes in the parish; and insisted that he was entitled to the tithes of hemp, clover-seed, and all other grass-seeds of what nature or kind soever, and whether the tithes thereof were great or small. He admitted that the rectory was impropriated, and the vicarage endowed; and insisted that the impropriator was entitled not only to the tithes of corn, grain, hay, and wood, but also to the tithes of hemp and of grass-seeds; and that the vicars had only, from the time of their endowment, recited all other small tithes; and that hemp and grass-seeds not being received in the endowment, he was not entitled thereto. He admitted the receipt of the tithes, as stated in the bill, and said that he was not compellable to account until the plaintiff should have fully established his right to the tithes in question.

The defendant *H. Pople* said, that clover and other grass had, for many years past, been permitted to stand for seed in the said parish, and had then been cut and threshed for seed; that the tithes of all such clover and other grass-seeds had been constantly claimed by

1783.

Payne
v.
Powlett.

the lessee of the rectory, as part of the tithes belonging thereto; and that the tithes thereof had been constantly delivered in kind, or compounded for with the said lessee; that neither the plaintiff, nor any other vicar of the parish, had ever received any tithe for any such clover or other grass, or any satisfaction for the same, or had ever claimed any such tithe, until the plaintiff thought fit to set up a claim thereto. He set forth an account of the clover and other grass-seeds which had arisen on the lands in his occupation; and insisted, that he was not liable to make the plaintiff any satisfaction for the tithe thereof.

The plaintiff replied, the defendants rejoined, and witnesses were examined on the part of the plaintiff, and the defendant *Anne Powlett* only; and the cause came on to be heard the 8th day of *May* 1733; when upon hearing the counsel for all parties, and reading several of the proofs taken in the cause, the court gave judgement.

Lord C. B. — This case is exactly within the reason of former cases. Where there is no endowment, and all other species of small tithes have been usually received by the vicar, it is a reasonable ground of presumption that he is entitled to all modern species of small tithes.

[1249]
Supra 938.

Eyre B. — *Cartwright v. Bailey* ought to govern this case. The usage must govern. The only evidence in the way of presumption of a general endowment is capable of an explanation that takes away the effect of it. It is a receipt by the rector for clover-seed. But that is explained by the notion that clover-seed was a great tithe; it was received therefore under a mistake.

Perryn B. — *Cartwright v. Bailey* is in point.

After the hearing a terrier was found, in which (*inter alia*) was the following passage: "The vicar, entitled to all tithes, the tithe of wood, corn, grain, hay, and hemp only excepted." The court thought it operated with the plaintiff rather than otherwise.

They therefore ordered the bill as against the dean and chapter to be dismissed with costs; and they further ordered the Deputy Remembrancer to take an account of what was due to the plaintiff from the defendants *Powlett* and *Pople*, for the tithable matters demanded by the bill for six years previous to the filing thereof; that the same be taken as against *Anne Powlett* for the money by him received for the said tithable matters, and as against *H. Pople* for the tithable matters which had arisen on the ground in his occupation, with costs.

The court now ordered the Deputy Remembrancer to take an account of what was due for the tithes of corn, grain, and hay, which the defendants, *Inns*, *Ward*, *Hill*, and *White*, four of the occupiers, had on the farms in their respective occupations from the

time demanded by the bill; and also an account of what was due for the like period in respect of the tithes of hay which the defendants, the earl of *Pomfret*, *Dunckley*, *Adkins*, *Clark*, and *Davis*, had taken from the farms in their occupations.

1783.

Payne
v.
Powlett.

But it appearing to the court, that the earl of *Pomfret*, *Dunckley*, *Adkins*, *Clark*, and *Davis*, had not any tithes of corn and grain for which the plaintiffs sought an account, it was further ordered, that so much of the bill as required the last-named defendants to set forth an account of the said tithes of corn or grain be dismissed with costs.

The court further ordered the bill as against *Lawford* to be dismissed, but without costs.

The court further ordered the several other defendants to pay their costs, except the costs of the tithes of corn or grain demanded by the bill from the earl of *Pomfret*, &c. (a)

Tr. 23 Geo. III. A.D. 1783.

[1250]

Scott, D.D. v. Fenwick and others. [Sir J. Skynner's MSS.]

THIS cause was heard in *Michaelmas* 1783, and at the sittings after that term, and in *Easter* 1784. And in *Trinity* term 1784, the Lord Chief Baron delivered the judgement of the court to the following effect:

S.C.
4 Wood's
Decr. 246.
The marginal abstracts are attached to their respective subjects.

Lord C.B. — This bill is brought by the plaintiff, Dr. *Scott*, rector of *Simonbourn* in the county of *Northumberland*, praying an account against several of the defendants of tithe of milk, and against other of the defendants an account of tithe of agistment.

The defendants against whom the account of tithe of milk is prayed, and who occupy farms in the district of *Bellingham* within the parish of *Simonbourn*, say in their answers, that by immemorial custom the several occupiers of messuages, farms, lands, or grounds, in and throughout the rectory and parish, including the chapelry of *Bellingham*, have been used to pay to the rectors yearly certain sums in lieu of tithe of milk produced from the cows kept on their several farms; i. e. for each of such cows, not producing a calf, called a *farrow cow*, the sum of three-halfpence; and for each of such cows, producing a calf in the same year, called a *new keld cow*, in case the calves dropped from the *new keld cows* belonging to or fed or depastured by such occupiers do not in the same year amount to five or more, the sum of two-pence; if to five or more, the sum of three-halfpence; payable at *Easter Monday*, in lieu of

(a) See also *Jackson v. Walker*, *supra* 1231. *liams v. Price*, 4 Pri. 156. *infra*. *Byam v. Booth*, *Kennicott v. Watson*, 2 Pri. 250. n. *infra*. *Wil-* 2 Pri. 231. *infra*.

1783.

Scott

v.

Fenwick.

the tithe of milk produced from such *farrow* or *new keld cows*, according to the several cases and events aforesaid.

The defendant *Thomas Charlton* says in his answer, that he occupies an ancient tenement in the chapelry of *Bellingham*; that by ancient custom the sum of one penny hath been yearly paid to the occupiers of every ancient tenement or farm within the chapelry and throughout the parish, for and in lieu of all tithe of grass yearly growing on the same, whether eaten and consumed by the mouth of cattle, sheep, or any other living goods, or cut, cured, and made into hay.

[1251] The defendant *John Robson*, who occupies two ancient tenements in the chapelry of *Bellingham*, and the defendant *Allen Macdonald*, who occupies six ancient tenements in that chapelry, insist on the like *modus* of one penny, payable for and in lieu of the tithe of grass yearly arising on their respective farms; whether it be cut and made into hay, or eaten by barren and unprofitable cattle.

The defendant *Thomas Charlton* insists on an ancient payment of four-pence for each score or twenty lambs taken in or permitted by any occupier of any lands in *Bellingham* to depasture, for the summering or *spaining* thereof for the time aforesaid, or for the usual time deemed proper for that purpose, and which yield no wool or lamb, in lieu of the tithe of lamb and wool.

The defendant *Joseph Wilkinson* says, that he has occupied jointly with his brother (but each of them depasturing his own cattle separately) lands in the district of *Simonbourn*, late parcel of *Simonbourn* common, which, upon a late division of the said common, were set out and allotted to *Thomas Ridley*, in respect of an ancient estate in the said parish having right of common thereon; and that from time beyond memory one penny hath been annually payable at *Easter* by the owners and occupiers of the said *Thomas Ridley's* ancient estate having right of common on *Simonbourn* common (in respect of which estate, as being an ancient tenement, called *Slaters-field*, the said lands occupied by the defendant were set out or allotted) to the rector for the time being, as a *modus* for or in lieu of the tithes of grass arising either in or upon the said ancient estate and the lands thereto belonging, or any waste, moor, or common in right or in respect thereof; whether such commons, wastes, or moors, were or should be divided or allotted, or permitted to continue undivided or unallotted; and whether the said grass or any part thereof be cut or made into hay; or, whether it be eaten by barren or unprofitable cattle.

The defendant *Humphrey Thompson* says in his answer, that he occupies lands, which were lately part of certain other moors or commons in the district of *Simonbourn*, and were upon a late

division thereof set out and allotted in respect of certain ancient estates, which he particularly names, having a right of common thereon, or on one of them; and he insists, that a *modus* of one penny for each of the said ancient estates, and the lands and grounds, and also the moors and commons thereto respectively belonging, so by him holden and occupied, hath been payable yearly by the owners or occupiers thereof, and, consequently, for the lands and grounds in his occupation, in lieu of tithe of grass arising on his last-mentioned grounds and lands, whether it be cut and made into hay, or be eaten by barren and unprofitable cattle.

1783.

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v.
Fenwick.

These are the defences of each of the defendants in this cause.

[1252]

As to the demand of tithe of milk, the defendants who are liable to that demand have not proved the *modus* of two-pence for every *new keld* cow, and three-halfpence for every *farrow* cow, which they have alleged by their answers to be payable in lieu and satisfaction of the tithe of milk. It was stated by their counsel, that though they had failed in giving satisfactory proof of the *modus*, which they had alleged; and which, it was said, they had alleged through mistake or ignorance of another *modus*, which actually existed, and had been always paid in the district of *Bellingham*, in lieu of that tithe; yet that they had sufficiently proved the existence of the other *modus*; and they proposed to read the depositions of several witnesses to prove that a *modus* of four-pence has been always payable and paid by the occupiers of ancient estates or farms, in that district, in lieu of such tithe arising from such estates or farms. This evidence was objected to on the part of the plaintiff, as being evidence of a *modus* which the defendants had not alleged in their answers, and therefore ought not to be received or read on their behalf. The court was of opinion, that the defendants having in their answers insisted on a particular *modus*, could not be permitted to enter into and read proof of another, or different *modus*; and the evidence proposed was not received. In the farther hearing of the cause the plaintiff's counsel thought it expedient, in order to take off the effect of some evidence read for the defendant, to read on the part of the plaintiff (as they were entitled to do) those depositions which they had objected to when they were offered to be read on behalf of the defendants. From those depositions it appears that a payment of four-pence yearly has been immemorially made by the respective occupiers of ancient estates or farms in the district of *Bellingham* to the rector; and there is a great deal of proof from reputation, from tradition, from the frequent declarations of the tithe-gatherer, and from the declarations of the last rector, that the four-pence have been paid for the tithe of milk. There is no satisfactory proof given on the part of

An issue cannot be directed where the evidence shews a *modus* different from that alleged; neither can there be in such a case a decree for the tithe in kind which the *modus* affects to cover.

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v.
Fenwick.

[1253]

the plaintiff to shew that the four-pence have been paid on any other account. For, as to the deposition of Mr. *Fleming*, the curate, it is far from satisfactory; and it is directly contradicted by the declarations of *Maire*, the tithe-gatherer, and of Mr. *Wastell*, the late rector, who expressly admitted, that the payment was not for keeping a book, as Mr. *Fleming* supposes, but for the milk of cows. And it is remarkable, that Mr. *Wastell's* declaration on that subject was made in the latter part of his time; and that he had been rector of the parish from the year 1723 to the year 1771, when the plaintiff, Dr. *Scott* succeeded to the rectory.

Under these circumstances the plaintiff's demand of tithe of milk in kind now stands. The court cannot direct an issue to try the existence of a *modus* on the behalf of the defendants which the defendants have not alleged in their answers. The court ought not to decree an account of tithe in kind on the behalf of the plaintiff, in direct contradiction to so much and such strong proof of a *modus* payable in lieu of the tithe, and that proof arising from evidence read on the plaintiff's part. The bill, therefore, as to such part of it as prays an account of the tithe of milk, must be dismissed.

Where a *modus* is alleged generally, and without any restriction, the court cannot direct an issue to try one with a restriction.

As to the demand of tithe of agistment, which is made upon five of the defendants, three of them, namely the defendants, *Charlton*, *Robson*, and *Macdonald*, who occupy ancient tenements or farms in the district of *Bellingham*, insist on a *modus* of one penny payable for each of their tenements or farms in lieu of the tithe of grass, whether cut and made into hay, or eaten by barren and unprofitable cattle, as two of the defendants say; or, as the other says, eaten by cattle, sheep, or any other living goods. It is in proof, that payments have been continually made for the tithe of agistment of sheep and lambs throughout the whole district, independently on, and without regard to, any custom or usage regulating such payments. There cannot, therefore, be a *modus* of one penny, or any *modus* payable for or in satisfaction of the agistment of *all* barren and unprofitable cattle. If there is *any modus* for agistment, it must be with some restriction. But the court does not, as was proposed by the defendant's counsel, direct an issue to try a *modus* with a restriction or exception, where the defendants have insisted on a *modus* generally, and without any restriction or exception; for that would be to try a *modus* different from that which the defendants have made the ground of their defence. As to these defendants, therefore, who occupy ancient farms in *Bellingham*, they must, in this cause, be decreed to account for their agistment tithes.

As to the *modus* insisted on by the other two defendants, *Willinson* and *Thompson*, to be payable for tithe of hay and agistment of their several inclosed lands in the district of *Simonbourn*, which were

part of wastes or commons, and which were, on the inclosure of those wastes or commons, allotted to different farms in *Simonbourn*, in satisfaction of the right of common which the occupiers of those farms enjoyed on the wastes; it is admitted, that payments for tithe of agistment of sheep and lamb, without regard to any usage or custom, have been continually made in the district of *Simonbourn*, as well as in the district of *Bellingham*; and there is, consequently, the same objection to the *modus*, as claimed for these new-inclosed lands in the district of *Simonbourn*, as there is to the like *modus* claimed for the old inclosures in the district of *Bellingham*.

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v.
Fenwick.

But, putting this objection out of the case, the *modus*, as it is alleged, *i. e.* for *hay* and agistment, cannot be supported. It is not proved, that by any usage or custom antecedent to the time when the inclosures were made, any *modus* was paid in lieu of any tithes arising on the commons; and the usage since the inclosure has been, as to these allotted lands, in direct contradiction to such a *modus*; for tithe in kind has been paid for these lands, both of hay and agistment. Nor does it appear that any agreement was made with the rector, at the time of the inclosure, respecting the payment of any *modus* for tithes, or for saving the rights of the owners of the farms over the lands when they should be inclosed; and without some agreement it might be a question, which it is not now necessary to discuss, Whether the *modus* was not extinguished by the inclosure? But, supposing that by usage antecedent to the inclosure, a *modus* of one penny had been paid for the farms and the commons, it could not have been paid for hay on the commons; for the commons, from the nature of them, and of the rights over them, could not have produced hay. Such a usage could not have afforded a presumption of any ancient agreement on the part of the rector to receive, and on the part of the owners of the farms to pay, an annual sum in lieu of the tithe of a tithable matter, which, at the time of making it, could not have been in contemplation of either of the parties, as the subject of their agreement, and over which one of the parties had no right. For, supposing the ancient rights of the owners of the farms to have been continued after the inclosure, yet the right of the owners of the farms could not, before the inclosure, be extended to any exemption from payment of tithe of hay; because, if hay had been produced on any part of the common, it would not have belonged to the owners of the farms who paid the *modus*, but to the owner of the land on which it grew, who was the lord of the waste. Considered in any light, this *modus*, in the manner it is alleged, for *hay* and agistment, cannot be supported.

A *modus* of so much a year payable by the occupiers of ancient tenements for the tithe of hay from commons, is void on the face of it.

As to the *modus* which the defendant *Charlton* has alleged to [1255] be payable for lambs, four-pence for each score taken in to de-

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v.
Fenwick.

pasture in *Bellingham*; if it be considered as a *modus* for tithe of agistment (which in fact it must be if any such *modus* for lambs exists), it is inconsistent with the *modus* of one penny for hay and agistment of *all* barren and unprofitable cattle. To avoid this inconsistency, he has alleged it to be payable for tithe of wool and lamb, though wool and lamb are not produced. But for whatever it be alleged to be payable, the payments for lambs depastured appear by the evidence to have been so various in such a number of instances, as to exclude all presumption of a *modus*.

Decreed, that so much of the bill as prayed an account of tithe of milk should be dismissed; and that the defendants who had cattle should account for the tithe of agistment, without costs on either side.

MS.
Semble,
where a
witness ap-
pears to be
interested
on cross-
examina-
tion, coun-
sel should
take the first
opportunity
of making
the objec-
tion; but if
he permits
the evi-
dence to be
read, he
thereby
waives the
objection.

In this case an objection was made to the evidence of a witness, because it appeared on his cross-examination that he was interested. It was answered to an interrogatory asking the witness, Whether he is interested or not, that he answers in the negative. After this the party proceeds in his cross-examination, and thereby makes him a competent witness. *Per cur.*—At law the old rule was, that the witness must be rejected, if at all, on the *voir dire* before the examination in chief began; and after such examination once commenced, the adverse party could object to his credibility only, and not to his competency. But this rule was found inconvenient, because it often happened, that an interest denied on the *voir dire* came out clearly on a cross-examination. The court therefore have, for a long time past, permitted the objection to prevail whenever the interest appeared in the course of the examination, provided the party entitled to the benefit of the objection urged it immediately; still holding, that if after the ground of objection appeared the party proceeds in his cross-examination, he thereby waives the objection, and shall not afterwards have liberty to make it. The rule of evidence in equity ought to be analogous to that in courts of law. When the interrogatories are drawn, it is impossible for the party to know what answers the witness will give to them; consequently, there is no opportunity of stopping in the course of the cross-examination, and of urging the objection, till after the depositions are published, and the evidence comes to be read in court. Then, if the party permits the evidence to be read, he thereby waives the objection to the competency of the witness; but, if he uses the first opportunity that offers, by urging it at the hearing before the evidence is read, it ought to be admitted and to prevail. If this is not the rule of evidence in courts of equity, it is time that the question should be mooted, and that it should now be established one way or the other.

Tr. 24 Geo. III. A.D. 1784. Scac.

1784.

Gaches v. Haynes. [MS.]

Gaches
v.
Haynes.

BILL by the vicar of *Wootton Warven* in the county of *Warwick*, for an account of the tithe of a water corn-mill for fifteen years. The defendant denies the vicar's right to the tithe of ancient mills; whether of lately erected mills, submits to the judgement of the court. He then sets forth an act of parliament passed in 15 G. 3. for inclosing the common fields in this parish, by which it was enacted, that the commissioners under that act should allot to the plaintiff and his successors, vicars, &c. (exclusive of the lands to be allotted to the plaintiff in lieu of his glebe lands), such parcel of the lands in the common fields directed to be inclosed, as the commissioners, making such allotment, should think and adjudge to be a full equivalent and compensation for the vicarial tithes of the said common fields in the said parish, after the rate of nine-pence in the pound of the real and true annual value of the said common fields at the time of making the allotment. And further, that the commissioners at the request and with the consent in writing of the vicar, or any proprietor of any old inclosed farms or lands in the parish, should ascertain and fix by their award such a yearly rent or sum upon and payable from each of the said old inclosed farms and lands, and the respective proprietors thereof for the time being, as in the judgement of such commissioners should amount to full 9d. in the pound of the real and true annual value of the said respective old inclosed farms at the time of making the said allotments for and in lieu of the vicarial or small tithes payable in respect thereof, which rents should be payable, &c. It was also enacted, that after such division, and the execution of the award, all right of common, and all great and small tithes for or in respect of the old inclosures, messuages, cottages, tenements, gardens, and orchards, for which there had been any allotment made, or any sum appointed to be paid, and also of the lands and grounds thereby directed to be inclosed, should cease and be for ever extinguished. He then sets forth an award made by the commissioners by which (*inter al.*) they ascertained the yearly rents or sums payable out of the old inclosed farms, and from the proprietors or occupiers thereof; and they thereby ordered *Peter Holford*, esq., the proprietor of the farm and lands in question in the occupation of the defendant, in lieu of the vicarial tithes of such farm and lands, the yearly rent of 6l. 19s. 1d. He said that the mill in question was an ancient mill, but in 1780 was moved one hundred yards down the stream; that if any tithe were due for it, the same is extinguished by the award of 6l. 19s. 1d. in lieu of the tithe of the old inclosure on which such mill stood, the said 6l. 19s. 1d. being 9d. in the

S.C
4 Wood's
Decr. 588.
The tithe of
mills may
in some
cases be
considered
as predial.

[1257]

1783.

Gaches

v.

Haynes.

pound of the rent of the said inclosure, including the said mill; that the award was made according to the tenor of the act, and with the consent of the vicar.

Supra 871.

Mansfield for the plaintiff insisted (*inter al.*) that the tithe of mills was a personal tithe; that it is not payable in respect of the land on which the mill stands; that a mill's being built upon lands exempt from tithes did not protect it; that in the case of *Thomas v. Price*, where a mill which stood upon ancient lands which were exempt from the payment of tithes was taken down and erected anew on lands alike exempt, an account was directed: that the mode of compensation in this case negatives the idea of its being a satisfaction for the tithe of mills; that 9*d.* in the pound or the annual value was not a mode of computing a compensation for the tithe of mills; that there was a proviso in the act, that it should not defeat the right or title to tithe-wood, or to vicarial tithes of old inclosures within the parish, in lieu whereof no sum or compensation was awarded, nor to any oblations, mortuaries, *Easter* offerings, or surplice fees, but that the same should remain due and payable; that the operation of this proviso was, that nothing was to be discharged of tithes by the act, for which a compensation could not be made.

[1258]

Burton for the defendant argued that the case of *Thomas v. Price* was not *ad idem*; for there an absolute, not a qualified exemption was claimed, and the courts are more rigorous respecting absolute exemptions; that in the case of *Russell and Moor*, 1 *Ro. Abr.* 651. *pl.* 1., if a man prescribes to pay to the parson a certain thing as a *modus* for all the demesnes of his manor of *D.*, and afterwards erects a windmill upon part of the demesnes, he shall not pay any tithes for the mill, but the *modus* given for the demesnes shall go in discharge of this also which is built on the land discharged; that in 1 *Ro. Abr.* 652. *pl.* 4. 2 *Inst.* 490. if a man be seised of eight acres of pasture and of meadow, for the tithes of which there has been paid time out of memory 5*s.* 6*d.*, and after the owner erects thereupon a corn-mill, he shall pay no tithe for the corn-mill, because the land was discharged *per modum decimandi*.

Eyre B. upon the first breaking of the case said, If this depended on the law, I should not have much difficulty to say that the later cases overthrow the old cases cited from *Ro. Abr.*, there being no valid distinction between lands exempt and lands covered by a *modus*, and the old cases having probably been decided upon a mistaken principle held at that time, that the tithe of mills was a predial tithe; but this depends upon the construction of a private act, which must be interpreted like a deed, according to the true intent of the parties.

It appears from the Decree-book, that his lordship afterwards, in delivering the judgement of the court, declared, that the tithe of a mill, though to be recovered in the nature of a *personal* tithe, is not to be taken strictly as a *personal* tithe, but is so far predial, and has so much reference to a certain place in which it arises, as in the particular case before the court, to fall within the description of a *small tithe*, for or in respect of an old inclosure for which a sum of money has been appointed to be paid by virtue of the act; and, as such, that it doth cease, determine, and is for ever extinguished.

1784.

Gaches
v.
Haynes.

The bill therefore was dismissed, but without costs, it being a new and doubtful question.

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Tr. 24 Geo. III. A.D. 1784. Scac.

Edward Wills Carr v. George Heaton, William Chamberlayne, Anthony Chapman,

AND

Sir Thomas Fowke, George Heaton, Robert Peat, William Chamberlayne, Robert Peat, v. Edward Wills Carr. [Sir J. Skynner's MSS.]

LORD C. B. — The original bill is brought by the plaintiff, as vicar of *Lowesby* in the county of *Leicester*, against the defendants, as occupiers of lands within the parish, for an account of all small tithes from 28th of *June* 1775.

* The defendants admit, that the plaintiff is vicar, but they deny that he is entitled to the small tithes, for they say, that he is entitled only to a pension of 6*l.* 13*s.* 4*d.* yearly, payable by the impropriator, who is entitled to all the tithes within the parish.

The cross-bill is brought by sir *Thomas Fowke*, as impropriator, and the other plaintiffs, who are occupiers, to establish the annual payment of 6*l.* 13*s.* 4*d.* in full satisfaction of all small tithes. It was declared by the court at the hearing of the cause, that the exemption was insufficiently alleged in the cross-bill, and could not be established; and that the cross-bill must be dismissed. Which I mention here, to put that suit out of the question.

The vicar's claim is founded on an ancient endowment in the time of *H. 3.* or of king *John*, of which there is sufficient evidence by the instrument which has been produced, by which the vicar appears to have been endowed of all small tithes, "*de omnibus minutis decimis.*" In the reign of *C. 1.* the vicar instituted a suit in this court against the then impropriator and others, claiming all small tithes. The defendant in that suit insisted that the vicar was entitled only to an annual payment of 6*l.* 13*s.* 4*d.* in the same manner as is alleged by the defendants in this cause. That cause proceeded to hearing,

S. C.
Anstr. 313.
4 Wood's
Decr. 268.
7 Bro.
P. C. 100.
(2d ed.)
The marginal abstracts are attached to their respective subjects.
*[1259]

1784.

Carr
v.
Heaton.

and the court declared (15 *Car.* 1.) the plaintiff to be entitled to all small tithes under the endowment, and established the right of the plaintiff and his successors to all the small tithes. Two subsequent orders were made (16 *Car.*) in that cause, carrying the decree into execution: the last of them declaring the plaintiff to be entitled to wool and lamb, as being small tithes.

There is evidence in the present cause, by one witness only, that about 1710 small tithes were received by a vicar from one farm in the parish. It is proved by the same witness, that when the impropriator about 1725 determined a composition with an occupier, he demanded only tithe of *hay*: and another witness, whose father collected for the impropriator in the lordship of *Newton*, says, that no small tithes were paid to him in that district. The plaintiff has likewise given in evidence the survey of pope *Nicholas*, in which the church or rectory of *Lovesby* is valued at twenty-two marks; the vicarage of *Lovesby* at seven marks. There is likewise in evidence a terrier dated 1700, signed by the vicar (Mr. *Smith*) and two churchwardens, in which it is expressed, that there are belonging to the vicarage, “a house, a close, and all vicarial tithes, *cum toto altaragio.*” And there is a return [1260] from the First-Fruits Office of the yearly value of the vicarage, 27*l.* 5*s.* 11*d.*

This is the whole of the evidence on the part of the plaintiff.

For the defendants it was insisted, that the endowment had been varied at some time previous to the 16th of *H.* 8., and a pension of 6*l.* 13*s.* 4*d.* granted to the vicar out of the rectory, which was appropriated to the hospital of *St. Lazarus de Burton*, and payable in lieu of the small tithes with which the vicar had been endowed. The survey from the First-Fruits Office taken in the 16th of *H.* 8. was read, in which the value of the rectory of *Lovesby* is 16*l.*; and then follows, under the article of outgoings, “*in pensionibus Gilberto Sturges vicario de Lovesby, 6l. 13s. 4d.*” And the valuation of the vicarage is “*in proficuis provenientibus de vicariâ ibidem, tam in exitibus mansionis et cujusdam clausi, quam in pecuniis, communibus annis, 7l. 1s. 4d.*” It appears, that the possessions of the hospital came to the crown in the 26th of *H.* 8., who in that year granted the rectory of *Lovesby*, among other possessions of the hospital, to lord *Lisle*, “*et decimas quascunque dictæ rectoriæ pertinentes*, as fully as the hospital had enjoyed them.” It reverted to the crown by the forfeiture of lord *Lisle*; and Q. *Mary* in the first year of her reign granted to *Fawnt* and *Chamberlayne*, the rectory, “*et decimas granorum, fœni, lanæ, et agnellorum, et omnes decimas quascunque.*” In this grant the grantees are discharged from all corodies and pensions; but there is an express exception “of the pension of 6*l.* 13*s.* 4*d.* annuatim solut’ vicario de *Lovesby*.”

“ *extra rectoriam de Lo. et eidem vicario et successoribus suis in dotatione assign.*” and 11s. 0 $\frac{1}{4}$ d. for synodals to the archdeacon. In the second year of queen *Eliz.* an inquisition was taken on the death of *William Fawnt*; and, among other possessions, which descended to *William* his son, is stated the rectory of *Lowesby*, “all tenths of corn, hay, lambs, wool, and other tenths in *Lowesby*, paying to the vicar of *Lowesby* 6l. 13s. 4d.,” and synodals to the archdeacon. There is another inquisition in the 30th of *Eliz.*; in which the rectory is stated in the same terms, and subject to the same pension of 6l. 13s. 4d. There are two decrees in the court of wards made in the 34th and 36th years of *Eliz.*, which, though they do not affect the rights of the present parties, yet shew that the vicar did not then receive all the small tithes. In the 45th of *Eliz.* there was a grant to *William Fawnt* of the rectory, with the same description of tithes as in the grant of queen *Mary*, and with the same exception of the pension of 6l. 13s. 4d. payable to the vicar out of the rectory. And there appear to have been several conveyances of the tithes arising on particular lands within the parish by the impropriator, or his trustees, in the same terms of description as in the former grant. The depositions in the cause in the time of C. 1. have been read; from which it appears, that the vicar had been used to receive 6l. yearly, and some species of small tithes, not including wool and lamb, in the district of *Cold Newton*, which tithes so received did not exceed the yearly value of 13s. 4d. There is likewise evidence of his receiving certain allowances of hay and wood, and the pasturage of two cows, which were not in his endowment. And it is in proof, that the value of the tithe of wool and lamb was at that time worth 90l. *per annum*; which, with the tithe of hay, and all the other tithes, except what had been received by the vicar in *Cold Newton*, had been received by the impropriator. It is in proof in the present case on the part of the defendants, that the vicar has not received any tithes; but that a sum of 13l. *per annum* has been paid to him by the impropriator.

1784.

Car
v
Heaton.

[1261]

Upon this evidence the question is, Whether the plaintiff is entitled to an immediate decree for all small tithes; or, whether there should not be some further inquiry into his right? It has been urged by his counsel with great force of argument, that a decree made between the same parties, on the same point, not appealed from, but signed and enrolled, is conclusive; and that as the decree made in the time of C. 1. has been signed and enrolled, the rights of the parties to that suit, who are represented by the parties in the present suit, namely, the vicar and the impropriator, are bound by it, the merits of it cannot now be discussed; and, con-

1784.

Carr
v.*Heaton.*

A decree in favour of a vicar in a cause between him and the rector will not be conclusive, though made upon the very point in question, if the ordinary were not a party to it.

*[1262]

An endowment is not conclusive evidence of the vicar's rights: they may be narrowed or varied by subsequent usage.

sequently, the plaintiff, the vicar, is entitled to the decree which he prays by this bill.

The rule is founded in sound policy, which requires that the decrees of the court should not be contrary and opposite to each other on the same point of right; for instead of producing certainty and security, it would create the utmost confusion. But a decree, which is to have this conclusive effect, must be made between parties who have a competent interest in the subject of it. The suit in which that decree was pronounced, was between the vicar and the impropriator, who was the patron. One of the parties had an absolute right; but the vicar, though he had the freehold of the vicarage, had no interest beyond his own incumbency. As vicar, * he could do no act to bind the interests of his successors in the vicarage. Before the restraining acts he could not have affected those interests without the concurrence of the ordinary, as well as of the patron; and the same reason and policy requires that the ordinary should be a party to a suit, the end of which is to bind and conclude those interests which the law hath appointed him to watch over and protect. And though the decree which was pronounced was in favour of the vicar's claim, yet, if there were not parties sufficient to sustain the suit, the decree pronounced in favour of the vicar can be no more conclusive, than if it had been to the prejudice of his claim. Considering the decree in this light, it has no more force in respect to the successors of the vicar, who was party to it, than a decree for an account of the tithes would have had. The conduct of the parties to the suit, or of their representatives, shews, that they considered the decree as not conclusive; and that they might at their pleasure depart from it. The decree seems to have been founded on the sole evidence of the endowment, and on a supposition that the endowment was conclusive evidence of the vicar's right. For though it appeared by the survey of *H. 8.* that the vicar was, at the time of making that survey, entitled only to a house, a close, and a pension of 6*l.* 13*s.* 4*d.*, and that the rectory had been frequently after granted by the crown with all tithes great and small, and with a reservation of 6*l.* 13*s.* 4*d.* to the vicar; and though it was proved that the vicar, in fact, had not received all the small tithes, but only certain species of small tithes in a particular district of the parish, not exceeding in value 13*s.* 4*d.* with the yearly sum of 6*l.*; yet the court, either supposing that the endowment could not have been varied, or that there was not sufficient evidence of any variation of it, instead of referring to a trial by jury a question of a mere legal right, which depended upon facts, decreed immediately in favour of the vicar, and established the right of him and his successors.

C A S E S

RELATING TO

T I T H E S.

H. 25 Geo. III. A.D. 1785. Scac.

Marbey v. Edmead. [4 Wood's Decr. 284.]

THE bill stated, that the rectory of *Chertsey*, otherwise *Cartsey*, was a rectory impropriate, with a vicarage endowed; that the said rectory had been, from time immemorial until the surrender thereof, appropriated to and part of the possessions of the abbey of *Chertsey*; that the abbot and convent were seised thereof, and of all the tithes thereto belonging, from time immemorial until the year 1402, when the vicarage of the said church was endowed with part of such tithes; that the vicars of the said church had immemorially, until the year 1331, held and inhabited a certain mansion-house contiguous to the church, with the adjacent curtilage, and received divers oblations offered at the said church; that in the year 1331, the abbot and convent, by a certain endowment, confirmed to the then vicar and his successors the said mansion-house, curtilage, and oblations; but that the vicarage was not thereby endowed with any tithes whatsoever; that in the year 1402, the bishop of *Winchester*, in whose diocese the said church is situate (with the consent of the abbot and convent), confirmed to the vicar and his successors the said mansion-house, curtilage, and oblations, and thereby gave to the said vicar and his successors all manner of personal tithes arising from the work, business, merchandize, and trade of fishing of the parishioners, wheresoever they should fish in the river *Thames* and the river *Waye* (the fishing in waters being private property and in the pools and ponds of the abbot and convent excepted; the tithes of milk, curds, cheese, butter, eggs, and pigeons; a moiety of the tithes of geese, honey, wax, hemp, apples, pears, pot-herbs, onions, and garlick; and the tithe of all other tithable things growing in gardens, excepting the tithe of all kinds of blade, whether the land was dug with the plough or foot; and except also the tithes, as well great as small, of the manor of *Cartsey*, *Hardwyck*, and *Rude*, which were therein mentioned

Upon a question of title where evidence of possession is doubtful, the court will not make a decree till the right has been settled at law, the account being merely consequential to the right, an issue was refused, though pressed for by plaintiff's counsel, but the bill was ordered to be retained for a year with liberty to proceed at law.

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to be the manors of the said abbot and convent, in whosoever hand, whether of the said religious persons or their farmers, the same should then be; and except all manner of tithes, as well great as small, then arising, or thereafter to arise, out of the township of *Crotford* and *Woodeham* in the said parish; and except all oblations then arising or to arise to the chapel of *St. Anne* on the hill or mount which was called *Eldebure*; all which tithes thereby excepted, and all other tithes, as well great as small, and the oblations within the said parish not hereby especially ascribed to the said vicar and his successors, the said bishop thereby declared his will to be, that the same should belong to the abbot and convent. The bill then stated the vicars had, from the year 1402, holden, enjoyed, and received, the said tithes, and parcels or parts of tithes, and other things granted and confirmed to the vicars by the said endowment, and continued so to do until the final surrender of the abbey; that they had ever since continued to hold, enjoy, and receive the same, or had been or were entitled so to do; that the said abbot and convent, from the making of such endowment to the time of the surrender of the abbey, continued seised of, and by themselves, or their tenants or farmers had received and taken all other the tithes and parcels or parts of tithes, as well great as small, yearly arising within and throughout the said rectory of *Chertsey*, or the tithable places thereof, or were well entitled to receive and take the same; that the abbey, being one of the greater abbies, was surrendered into the hands of *H. 8.* on the 19th of *June*, in the 30th year of his reign, and by virtue of such surrender and the statute 31 *H. 8.* became vested in him; that the said rectory and the tithes thereof (except the tithes of *Olney Cake Mills*, which were granted out by the crown together with the said mills) continued vested in the crown from the time of the surrender until the 7th day of *November*, in the 5th year of *Ja. 1.* when he, by letters patent, dated the said 7th of *November*, granted to *Richard Lydal* and *Edmund Bostock*, and their heirs for ever, the said rectory of *Chertsey*, with all rights, members, and appurtenances, as stated in the bill; that by virtue of divers mesne conveyances the said rectory with its rights &c. had become vested in *Thomas Orby Hunter*; that he, about 1764, sold and duly conveyed the same to the plaintiff, his heirs and assigns; that the plaintiff ever since has been seised of the said rectory, with all its rights, &c. so granted as aforesaid; that, as rector thereof, he was entitled to all the tithes and other appurtenances to the said rectory belonging; that the said *Thomas Orby Hunter* did in 1763 grant a lease of all the tithes of the said rectory to *William Edmead* and *John Martin* deceased, their executors, &c. for fourteen years, to commence from the year 1762; that they

held and enjoyed the same during their lives; that the defendant *R. Edmead* was one of their representatives; that the said defendant *Richard Edmead* had, ever since *Christmas* 1776, occupied *Simple Marsh Farm, Chertsey Mead*, and other land situate in *Hardwicke* in the said parish of *Chertsey*; that he rented the same of the other defendants, and also rented of the plaintiff another farm; that upon the said farms and lands he had had wheat, barley, oats, rye, peas, beans, hay, clover, cows, sheep, calves, milk, lambs, wool, barren and unprofitable cattle, and various other tithes, as mentioned in the bill; that the said lease expired at *Michaelmas* 1776; that the said defendant *Edmead* had in each year since *Michaelmas* 1776 taken from the several occupiers in the townships of *Crotford* and *Woodeham* in the said parish sums of money as a compensation for their tithes, and had converted the same to his own use; that he, the plaintiff, had from time to time requested him to set out and pay the said several tithes which he had on his said farms and lands since *Christmas* 1776; but that he had refused so to do, and also to pay over to him the money received by him as aforesaid. The bill then further stated, that the defendant *Morest*, as vicar of the parish, claimed the tithes arising from the three farms and lands in the defendant *Edmead's* occupation; and that the bishop of *Winchester*, as ordinary, disputed the plaintiff's right to the tithes of the said farms and lands. The bill therefore prayed, that the plaintiff's title to the tithes arising from the several farms aforesaid might be established against the defendants the *Franks's*, and against the defendant *Edmead*, claiming to be the lessee or tenant thereof; that the defendant *Edmead* might account for the said tithes from *Christmas* 1776, and also for all money received since that time; and that he might be decreed to pay what should appear due on such account.

The defendants the *Frankses* said, that the rectory of *Chertsey* was a rectory impropriate, with a vicarage endowed; that the abbots and convent were, for a long time before, and to the time of the dissolution of the said abbey, seised of the rectory and the tithes thereto belonging; that it being one of the greater abbeys it was surrendered into the hands of *H. 8.*; that the said rectory and the tithes thereof, as parcel of the possessions of the said abbey, thereupon vested in the crown; that the said rectory, some years ago, was vested in the ancestors of *T. Orby Hunter*; that he sold and conveyed the same to the plaintiff; and that the plaintiff was entitled to such tithes and appurtenances as belonged thereto; but they further said, that after the abbey vested in the crown, divers grants, leases, or demises had been made and granted of the lands thereof; that, amongst others, the farm and tithes of *Simple Marsh*, and some other tithes, had been sold and conveyed by lord *Castle-*

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main to his, the defendant's, ancestors; that particularly by grants of queen *Eliz.* and *Ja.* 1. dated the 3d of *February* in the tenth year of his reign, to *F. Morice* and *F. Phillips* for ever, as in the answer was set forth; that the same were holden and enjoyed free from payment of tithes or composition to the rector; and that no claim had ever been made for the same till it was made by the plaintiff; that the indentures of bargain and sale of the said said premises by lord *Castlemain* to their ancestors, dated the 24th of *November* 1738, were enrolled in Chancery touching *Simple Marsh Farm*; that by virtue thereof the said farm was held and enjoyed free from payment of any tithes whatsoever; that they, by indenture dated the 7th of *December* 1762, demised to the defendant, *Edmead's* father, his executors, &c. *Simple Marsh Farm*, and also the *Tithing Plots* belonging to the manors of *Walton* and *Pinford*, to hold to him, as therein excepted for twenty-one years, at 200*l. per annum*; that the defendant *Edmead* then held the same; that the plaintiff had no right to receive the tithes thereof; that they had never been paid to any rector of the parish; but that they, the *Frankses*, were justly [1268] entitled to the tithes of the said three farms, and were strangers to the claim set up by the plaintiff.

The defendant, *Richard Edmead*, said, that the plaintiff, as rector, was well entitled to all tithes (save as to the lands leased to the defendant's father); and he set forth the names of the several farms and lands which he held of different persons, and which of them he paid tithes for, and which he did not; and also the quantities, qualities, and values of the tithable matters and things he had had thereon; and spoke as to the said three farms and lands as the other defendants had done, and said that he occupied them as tenant; that they had always been held tithe free by the proprietors thereof; and that no tithes or composition had ever been paid for the same.

Upon the hearing the court said that this was a question of title; that the evidence of possession was doubtful; that they therefore would not make any decree till the right had been settled at law, the account being merely consequential to the right; and that the proper tribunal for the trial of right, if the possession was equivocal, and for the construction of deeds under which parties claimed, was a court of law. They refused to direct an issue, although the plaintiff's counsel strongly pressed for it, in order to have the right tried at law, with the assistance of the court, but ordered the bill to be retained for a year, with liberty for the plaintiff to proceed at law.

H. 25 Geo. III. A. D. 1778. In Canc.

1778.

(Reg. Lib. A. 1784. fo. 749.)

Anderdon

Anderdon v. Davies and others. [Sir J. Mitford's MS.]

v.
Davies.

BILL to establish the *moduses*, viz. 2*d.* for a cow, 1*d.* for every tenth calf, 2*d.* an acre for hay, and 2*d.* for a garden. The bill laid the payment on the 31st of *December*; the evidence was of payment at *Easter*. It was objected that this, in a bill to establish a *modus*, was fatal. The Master of the Rolls, Sir *L. Kenyon*, overruled the objection, and the defendant declining an issue, ordered the *moduses* to be established, and that the plaintiff should pay the defendants the costs of the suit. This decree was in fact by consent, but his Honour had been of opinion in a case of *Sanders v. White*, and *Baliol College*, that with respect to *moduses* as to which the vicar prayed no issue, he should have costs; and as to *moduses* which were tried upon issues, and found against him, they should be established without costs. (a)

The court will establish a *modus* though proved to be payable on a different day than that stated in the bill, and the defendant declining an issue in such a case will be allowed his costs.

H. 25 Geo. III. A. D. 1785. Scac.

[1269]

Warren v. Fisher. [MS.]

THE rector of *Kenwarton* in the county of *Warwick* claimed the tithes, both great and small, arising in the parish, particularly of cows, mares, ewes, sows, calves, colts, lambs, pigs, poultry, sheep depastured after shearing, and sold fat before the next shearing time, and the agistment of barren and unprofitable cattle.

S. C. Serj. Hill's MSS. vol. xxi. p. 137. 4 Wood's Decr. 289. The court cannot direct an issue upon customs not stated with precision. In a *modus* for agistment-tithe, the time to be covered by it must be shewn.

The defendants admitted, that they occupied farms in the township of *Kenwarton*; but denied that the rector was entitled to receive the tithes thereof in kind; and insisted on a *modus* of 5*d.* for every cow and calf fed in the hamlet, when the calf was calved upon the land, viz. 4*d.* for the calf, and 1*d.* for the cow, on the next *Old Midsummer-day* after the cow had calved, let her age be what it might, or so soon after as the same was demanded, in lieu of all tithes in kind of the calves and of the milk of such cows respectively; also 1*d.* for each barren cow of three years or upwards fed in the hamlet on the *Old Midsummer-day* next after such cow became barren, or as soon after as the same was demanded, in lieu of all tithe of agistment of such barren cow; also 1*d.* for every colt foaled upon the land, payable as aforesaid, in lieu of the tithe of such colt.

Eyre, B. absent L.C.B. — This is a bill by Dr. *Warren* rector of *Kenwarton* for subtraction of privy tithes. The defendants allege three *moduses*. The first is complicated in the form of it. Upon the evidence there is a reasonable foundation to think it doubtful,

(a) See also *Clifton v. Orchard*, 1 Atk. 610. *Cleeves v. Knyston*, supra 1048. *Prevost v. supra* 746. *Berners v. Hillelt*, supra 871. *Bennett*, 2 Pri. 272. infra.

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whether there have not been ancient customary payments respecting these different tithes. No tithes in kind have been paid; the receipts specifying entire sums for calves, &c. *viz.* 15*d.* for three calves, and so forth, are strong to this. The evidence of the *terriers* is open to the observation made by the defendant, *viz.* that they purport to describe general rights, and not modes of payment. These therefore do not amount to a contradiction, at the same time the specifications in them lead us to suppose they would have contained this, and their silence does afford some degree of inference. But though there be clearly evidence to make the payment doubtful, yet it is clear, unless the defendants have stated precise customs, it is not enough to shew some payments; they will have no application but to the precise *modus*s. As to the first *modus* 5*d.* for cow and calf, &c. it is awkwardly expressed; but there is a substantial difficulty; the entire sum is for two species of tithe; the distribution of 4*d.* for one, and 1*d.* for the other, resting on the evidence of *Fisher*, and on the written evidence left general, where it is "calves so much." I doubt whether the *viz.* be sufficient in point of form? I do not therefore see any way to direct an issue. (a) As to the second *modus* it is fatally defective, for the time to be covered is most essential in agistment-tithe. As to the colts, it seems advantageous to the parson, and the evidence is strong as to this. I would recommend it to the parties to settle the question in as amicable a way as possible. The strict decree is an account with costs as to two *modus*s, and the bill dismissed with costs as to the colts. — They agreed afterwards to account as to the *modus*s, without costs on either side, on the foot of customary payments.

P. 25 Geo. III. A. D. 1785. Scac.

Lewis v. Giffard and others. [MS.]

S. C.
4 Wood's
Decr. 292.
To a bill
by a vicar
for tithes,
the impro-
priator need
not be
made a
party where
his alleged

BILL by the vicar of *Charlton* in *Wilts* for the subtraction of tithes, *viz.* all small tithes for 1780, 1781, and 1782. Five of the defendants joined in answer; one only was separate, but the ground of defence was the same, except that two of them had set-offs. They made two points: First, that they had already accounted and paid for several things, and tendered the rest. Second, as to the agistment, a claim set up by the lessee of the impropriator. The institution and induction were admitted; occupation was admitted;

(a) "As to the first being for a cow and calf fed and depastured, this, in strict critical language, could only be where the calf was kept and turned on the ground, as well as the cow, and that where that was not the case there must be no tithe at all."

Note also, that the giving leave to amend the

answer as to the laying of *modus*s was said, by baron *Eyre*, to have been found inconvenient; and that they chose rather now to put the party to bring a new bill. I am informed that this had before been often practised in tithe causes. S. C. Serj. *Hill's MSS.*

the plaintiff clearly falsified the account of tithable matters, and proved fraud as to all the defendants in two articles, viz. carrying the ewes out of the parish to drop their lambs, and the sheep to be shorn, bringing them back, the sheep almost immediately, the ewes and lambs as soon as could be with safety. The value of the agistment, and of the gardens, and the quantity of every thing, were matter of account merely to be referred to the Deputy Remembrancer.

Mr. Price for the defendants stated, that agistment-tithe had never been paid previous to the time of the present plaintiff. He said, that the parish consisted by reputation of thirty-six yardlands, twenty-five of which the rector had a right to, and the vicar to no * more than eleven; that the rector ought to have been made a party.

Per Cur.—There is no appearance of any necessity to wait for the rector to be made a party. The claim is only to some species of tithes very indefinite, and not like a *real* claim. The cause may go on without him. The objection was therefore over-ruled.

Mr. Price not being able to resist an account, the court decreed an account generally against all the defendants, except *Towne* and *Cane*, who had set up cross demands. As to *Cane*, the balance having been paid to him before the bill filed, or at least before answer, and the plaintiff not having charged fraud in the account by amendment of his bill, or otherwise, so as to entitle him to open the account, the bill was dismissed as against him; and as to *Towne*, an account was decreed to be taken of his cross demand, proof of tenders having been entered as read. The court did not think itself authorized to decree any thing respecting the fraud, or to direct the Master to take an account of the lambs and fleeces so dropt and shorn out of the parish, the plaintiff not having brought that matter in issue either by a charge in his bill, or by subsequent amendment.

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claim is indefinite and not like a *real* claim. To carry the ewes out of the parish to drop their lambs, and the sheep to be shorn, bringing them back almost immediately, and the ewes and lambs as soon as can be with safety, is a fraud on the vicar.

*[1271]

M. 26 Geo. III. A.D. 1785. Scac.

Deloës v. Lord Bagot. [MS.]

To a bill for tithes, the defendant set up several *moduses*. It was moved by the defendant to discharge an order obtained as of course for referring interrogatories to the Master for being leading. The ground of the motion was, that the order had been obtained too late; that the right to ask it had been waived by the subsequent proceedings, and the plaintiff's acquiescence. Publication had passed in *Michaelmas* term, the plaintiff then set down the cause for hearing in the following *Hilary* term. At the *Hilary* sittings application was made by the defendant that the cause might stand

S.C.
4 Wood's
Decr. 294.
A motion may be made for referring interrogatories to the Master for being leading even after publication.

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passed, and
the cause
has been set
down for
hearing.

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over till this term, and it continued in the paper of causes, till the plaintiff struck it out without leave of the court, a few days only before it would have come on for hearing. It was urged by the defendant's counsel, *Newnham*, *Burton*, and *Mitford*, that this was analogous to a motion to change the venue, to remove causes, to *refer answers for impertinence, and to pleas in abatement, where the advantage is waived by not taking it in proper time.

Cur.—It is admitted that there is no rule limiting the time. No affected delay in this case appears on the part of the plaintiff. It is not similar to dilatory pleas, because they are for mere slips. This is important to the justice of the case. It is not similar to other cases that have been alluded to, because here no step has been taken which amounts to a waiver. It is doubtful whether this sort of interrogatory could not be taken advantage of even at the hearing, notwithstanding the order against arguing irregularities in depositions at the hearing. There is no sufficient ground for discharging the order.

Tr. 26 Geo. III. A.D. 1786. Scac.

Bennett v. Read and others. [MSS.](a)

S.C.

1 Anstr.
322. n.

A custom for every householder inhabitant within the parish, to pay 2d. at Easter, by the name of hearth silver, garden silver, shot and waxen silver, in satisfaction of the tithe of the produce of any garden, yard, or orchard, occupied in the parish by such

In the parish of *Long Sutton* in the county of *Lincoln*, which is very large and extensive, containing upwards of twenty thousand acres, there is a rector or impropriator and a vicar endowed. The impropriation of this parish with the perpetual advowson of the vicarage, subject to the life of the then vicar, had been purchased by the plaintiff *Bennett*, who had afterwards obtained from the vicar a lease of the vicarial tithes. Thus invested with the character of both rector and vicar, he filed his bill, the vicar also being a co-plaintiff, against the defendants for the agistment-tithe of sheep from the time of their being shorn to *Old Candlemas-day*; and also for the agistment-tithe of bullocks, barren cows, and horses not used in husbandry business.

The defendants by their answer insisted upon *modus*. Issues were directed, and at the trial at *Lincoln*, a verdict was found establishing the first *modus* somewhat different from what it was laid.

It was in these words. "That every person being a householder inhabitant within the said parish, and occupying a messuage, cottage, garden, orchard, yard, land, meadow, pasture, or marsh ground, within the same, has, from time whereof the memory of man

(a) The report of this case is longer than most of those which I have had an opportunity of laying before the reader. But let not the length discourage him from the perusal of it: the subject is in itself important: the arguments of the counsel, which are given in detail, are those of Mr. Serj. Hill, Mr. Burton, and Mr. (now Sir

John) Mitford; and the relation of those arguments is from a note of Mr. Samuel Compton Cox, in his own hand-writing, and taken by himself. The judgement of the court is from a manuscript in the collection of the late Lord Chief Justice Eyre. (See also *Bennett v. Allenby*, 4 Wood's Decr. 54. *Bennett v. Peart*, *ibid.* 236.)

runneth not to the contrary, paid and been used and accustomed, and of right ought to pay to the vicar of the said parish for the time being, the sum of 2*d.* at the feast of *Easter* or afterwards upon reasonable demand, by the name or names of *hearth silver, garden silver, shot and waxen silver*, in lieu and full satisfaction of all and singular the tithe of herbs, roots, flowers, apples, pears, nuts, and other fruits, in or upon any garden, orchard, or yard, occupied by such person within the said parish, yearly growing, arising, and renewing; and of all wood, cuttings, toppings, and croppings of trees cut in such year upon land occupied by such person within the said parish; and of all herbage and agistment of barren and unprofitable cattle kept, fed, and depastured, by such person in the said parish or the tithable places thereof in such year; which sum of 2*d.* hath been during all the time aforesaid accepted by the vicar of the said parish for the time being in lieu and full satisfaction of the tithes aforesaid."

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householder inhabitant, and of all woods, cuttings, and loppings, cut in the year, upon land in the parish in his occupation, and also of the agistment-tithe is good. A custom for every person resident and occupying lands within the parish to pay 3*d.* for every sheep sold or sent out of the parish, after *Old Candlemas-day*, and before shearing time, in lieu of the tithes payable in respect of such sheep, is good.

The other *modus* set up and found by the jury was, "That every person resident and occupying lands within the said parish, and having sheep fed and depastured there, shorn within the said parish in any year, and sold and sent out of the said parish after the 13th day of *February*, commonly called *Old Candlemas-day*, in the next year, and before the next shearing time, or which have been bred in the same parish, or have been brought into the said parish, after the shearing time in any year, and sold or sent out of the said parish after the 13th of *February* next following, and before the next shearing time, hath paid, and for all the time aforesaid hath been accustomed to pay, and of right ought to pay to the vicar for the time being the sum of 3*d.* for every such sheep, in lieu and full satisfaction and discharge of the tithes due and payable to such vicar for such sheep, &c."

It was stated by the defendants in their answer, and it appeared to be true, that great part of the said parish had been recovered from the sea, and consists of marsh land, and that the first *modus* was for the purpose of encouraging an influx of inhabitants.

Upon the cause coming on for further directions after the verdict, *Pryce, Mansfield, Newnham*, and *Ainge*, argued for the plaintiff against the validity of the *modus*.

The *modus*, they said, set up by the defendants at the trial, and [1274] upon which the issue was directed, was not confined to *householders*: but, as the court gives a latitude to a jury in their finding of a *modus*, they found it differently, confining it to *householders*. This, though conclusive in point of fact, is not so as to the legality of the *modus*. The *modus* is bad in point of law: it is a payment in lieu of three species of tithes different in their nature and their common law rights: it blends great and small tithes together,

1786. which, when you consider rector and vicar, belong to different persons in different rights; to the rector by common law right; to the vicar by endowment or prescription. It is one entire payment without ascertaining what belongs to any of the tithes, and there can be no equal integral division of the money to apportion it to each tithe. Another ground of objection arises from the names themselves: for it appears from thence that it is the payment of one tithe in compensation for another; *hearth silver* relating to the house, *garden silver* to the garden, *waxen silver* for wax consumed at the altar for *ave-marias*. But the great objection to the *modus* is, that it is unreasonable and uncertain, inasmuch as it depends upon the number of inhabitants householders, who may be reduced to few by each one having more land; or it may be in the hands of foreigners, in which case the *modus* may become uncertain in its produce.

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They further said, that the two *moduses* contradict and invalidate each other: the first is a *modus* for all unprofitable cattle, including therefore sheep during that period of the year when they are unprofitable: the other *modus* is a different payment for the same thing; for the sheep would otherwise pay an agistment-tithe during that time, and the *modus* is therefore an agistment *modus* as well as the other, covering part of the same article.

Hill Serjeant for the defendants.—The defence to the plaintiff's bill is the *modus* as found by the jury. Questions have before arisen with respect to the tithes of this very parish. The *modus* has been twice found by juries, once in the time of *Ja. 1.*, and again in the summer of 1783. The opinion of the court at different times was in favour of this very *modus*. In the year 1617, the vicar libelled against *Sowter* in the ecclesiastical court: *Sowter* obtained a prohibition upon the suggestion of this very *modus*, only the proceedings being at that time in *Latin*, the expression was *Pater-familias*, instead of *Householder*. Now the granting of the prohibition shews, that the court thought it a good *modus*, or at least doubtful. The declaration in prohibition was founded on the [1275] *modus*, and there was a verdict in favour of it. In Prohibition the defendant is an actor as well as the plaintiff, and he might have proceeded: but he did not; he submitted, and no consultation was granted.

About seven years afterwards another dispute arose, and a bill was brought in the Duchy-court against *Thompson*, the then impropriator, and *Clerke*, the then vicar; and there the plaintiffs laid the *modus* too extensively, as was afterwards done in the year 1783, for it was laid so as to take in outners, or out-townners, and the vicar then admitted the *modus*, and insisted only that it did not extend to outners. A commission issued, and the witnesses in

their depositions include outners. The cause came on in the Duchycourt in *Michaelmas*, 7 Car. 1. and the decree takes notice that there was an assistant baron from this court, and a judge from the Common Pleas. The decree declares the opinion of the whole court impliedly in the restrained sense, because it makes no doubt of the *modus* but as to outners, and directs it as to outners to be tried at law: but it does not appear at that time to have been tried.

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There was a third suit in this court upon a bill filed by *Thompson*, stating the custom and admitting it as to all but outners, and stating the defendants to be all outners. The defendants by their answer insisted upon the *modus* extending to outners. The further proceedings in this cause do not appear.

In 1783, another cause came on to hearing between the present plaintiff and *Peart*, in which the *modus* was laid dropping the word "householders," and extending it to outners, and upon trial the *modus* was found as laid in the present cause.

It has been objected, that the verdict was only collateral. It is true, when applied to the modern verdict in 1783, but not to the verdict on the pleadings in prohibition. In the cause in 1783 there was a material defect, because the question was there made upon the *modus* extending to outners, which was not found, and as the defendants were outners, the plaintiff was entitled to a decree. Had the defendants been inhabitants and householders, the decree ought not to have been made against them; for in *Austen v. Pigot*, Cro. *Supra* 217. *Eliz.* 736. this court held the proof in prohibition, though not quite precise as laid, yet, if it shews that the court christian ought not to hold plea thereof, it is sufficient; and therefore if there be a prescription that the parson holds one hundred acres of land in satisfaction of tithes, and the proof be that he holds sixty acres only in satisfaction of them, it is well enough. And in *Bumb.* 16.(a) [1276] where a composition was pleaded to a bill for tithes of five closes and found for three, the court said they saw no difference between a prohibition and a bill in this court, and a mere slip in the statement of the *modus* will not prevent this court from doing justice. In *Hardcastle v. Smithson and Slater*, 3 *Atk.* 245. Lord *Hardwicke* *Supra* 784. says, though it be true, that tithes in kind are the right of the parson, yet, where there are customary payments in lieu thereof from time immemorial, they must have weight. Every purchaser who comes into this parish pays according to the rate of those payments, and buys upon the faith of them; and unless there are some strong insurmountable reasons to overturn these cus-

(a) This case is incorrectly stated and paged. No such case appears as cited, it is probably *Taylor v. Walker*, Bun. 267. *supra* 699.

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tomary payments, the court will not easily be brought *quieta movere*, and yet rules of law ought to be adhered to with regard to *moduses*.

The reasons offered by Mr. *Pryce*, are not such as will overturn the *modus*. His cases are all on prescriptions, and not on customs. Many customs bad in law have been supported on the reason from *Brownlow* to Lord *Raymond*. Mr. *Pryce* objects that the *modus* is bad, inasmuch as it jumbles different species of tithes together, and that it is one entire payment for three different species of tithes payable to different persons. But the vicarage did not exist till long after this *modus*, and no act of the owner of the tithes can

Supra 697.

prejudice the parishioner. In 2 *P. Wms.* 522. the same objection was taken, that the consideration of making tithe-grass into hay for the benefit of the rector could be no consideration as to the vicar, who was entitled to the small tithes of herbage. But the Chancellor said, that was nothing, for, originally, of common right, the parson was entitled to all the tithes, as well great as small, and the *modus* (supposing it to be a good one) must have been time out of mind, and, consequently, must have been while the parson was seised as well of the small as of the great tithes, and afterwards the vicarage was derived out of the parsonage, and the parson by the consent of the patron and ordinary endowed the vicar with these small tithes. This shall not prejudice the parishioners, or deprive them of the benefit of enjoying the *modus* which they were before entitled to. In *Bunb.* 180. it was holden, that a *modus* to the rector was a good bar to the vicar; and in 1 *Mod.* 216. (*anon.*) there is the same point. So is *Winch.* 245.

Supra 653.

Supra 652.

[1277]

Finch v. Masters, *Bunb.* 161. goes to all the objections taken to this *modus*. The case in 1 *Ventr.* 3. (*anon.*) is plainly distinguishable from this; for that was a *modus* "that the proprietors and occupiers of such a manor or any parcel of it should pay a groat to the parson for herbage tithes;" and the court held it ill, for if a man had but two or three feet of ground in the manor he should pay a groat. But in this case it is laid for *householders*, and therefore the reason in the case in *Ventris* does not apply here, for a penny is not an unreasonable sum for a householder to pay for his house. Lady *Gresham's* case is said to have been where one prescribed to pay yearly by the hands of two persons inhabiting in such houses four-pence to the vicar in satisfaction of all tithes; and it was adjudged ill, *because the houses may decay or none live in them*, so nothing would be paid. But this case is only suggested by the counsel in *Parry v.* and is no where to be met with.

Supra 275.

Cowper v. Andrews, *Hob.* 39. a suggestion of a *modus decimandi* for a park of 2s. a year, and a shoulder of every third deer killed in the park, which is now disparked. It is clear from reading the

report, that it was the 2s. which supported the prescription, and that if it had been only the shoulder of venison, the *modus* would have been gone by the disparking, for there cannot be a prescription in *non decimando*, and therefore without the 2s. there must have been tithes in kind of the park.

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In *Carleton v. Brightwell*, 2 P. Wms. 462. a *modus* for tithe of corn for the inhabitants of such a tenement and the lands therewith usually enjoyed, was void for uncertainty in regard the tenements may be uninhabited, and the lands often shifted and let with other farms. But there it was altogether uncertain, for it was not for such lands as were holden with the house, but for such as were usually holden with it. Supra 676.

It is objected, that the houses may be reduced to few, and that the inhabitants of them may hold all the feeding land in the parish, which would reduce the vicar's provision to nothing. But this is not to be expected: this payment is laid by way of custom to encourage habitation. This was a fen country, extremely unwholesome, and it was absolutely necessary to hold out great encouragement to induce people to live in it. This exemption was a *douceur*, like the case in 1 Ro. Abr. 650. pl. 12. where being alleged by way of custom in the parish, and for the purpose of procuring feed for plough-cattle, a *prescription* was allowed, which otherwise would have been bad in law. Here the *modus* is laid by way of custom, and a reason given for it, viz. for the better cultivation of the country.

The last case was *Travis v. Whitehead*, where the vicar, who filed his bill for tithe-hay, made out his title in this manner—that there was a bad *modus*, not sufficient to bar him, but sufficient to shew, that he was entitled to be paid for that for which the *modus* was set up. The defendants said, the vicar had never received the *modus* at all, and therefore, as against them, the validity of the *modus* could never have come in question, the only question being, whether the vicar had made out his title to that species of tithes: therefore the *modus* in that case could not have been determined to be bad.

[1278]
Supra 1066.

This payment has been said to be one sort of tithe in compensation for another. But there is no colour for that: it is a payment of a single sum in compensation for three different species of tithes.

The writers sometimes confound custom and prescription, immemorial usage being necessary to both, though they are very different in their nature. *Doctor and Student*, 2 L. c. 55. Bro. tit. *Prescription*, pl. 93. *Doctor and Student* says a custom in *non decimando* may be good, if there be sufficient left for the parson. It is clear that a *prescription* in *non decimando* is void,

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and I should not choose to go so far as to say that a *custom* in *non decimando* would not be bad. In a vill I should think it would. But it is clear, that a *prescription* in *modo decimandi* is allowable. There is no case which has gone to destroy a custom of tithing merely on account of its minuteness, and unless it is liable to some unsurmountable objection the court ought to decree for the *modus*. There are other *moduses* in principle like the present, though perhaps not so important in their consequences; and this is not a prescription, but a custom. In *Godb.* 60. there was a prescription for a particular inhabitant of a house to be free from all tithes of willows, but held bad: but, if it had been all tithes of willows cut by him, it would have been good. 1 *Ro. Abr.* 648. It is a good *modus* for tithe of eggs to pay thirty eggs in *Lent* in lieu of all tithes of eggs. In *Salk.* 656. the same case is cited, and agreed to be law. A *modus* of 2d. for every hogshead of cyder is very common. *Bunb.* 57. *Reynall v. Ackland*, *Tr.* 12. G. 1. a *modus* of 2d. per hoard of all apples of the occupier of every orchard in the parish was found on an issue, and established by the court. A hoard is that quantity which a man keeps for his own use for the whole year.

[1279]

This is a case of a general custom, which is one division of the laws of *England*, which are divided into common law, statute law, and custom. *Co. Lit.* 110. b. But prescription is not a distinct part of the law, but is a thing allowed by the common law to supply the want of a grant. The difference between custom and prescription is no where so well laid down as in *Rowles v. Mason*, 2 *Brownl.* 193. by *Coke* C. J. Nothing may be good by prescription, but what may have had a lawful grant: not so by custom. *Cro. Car.* 418. 1 *Lutw.* 128. Some customs prevail for the encouragement of marriage, some of habitation. *Holland* is in a low situation, marshy and unwholesome: the books take notice that *douceurs* were at first given to encourage draining and cultivation. It is a rule that inhabitants can only prescribe by way of easement, as for a right of way. 2 *Keb.* 680. In lord *Raym.* 407. there was a claim of common by the inhabitants, and it was made by way of *custom*, and it appeared to have been condemned before when laid by way of *prescription*. 3 *Keb.* 247. Acts of parliament have been presumed in support of customs: there is a case of one in *Skinner*, *Cro. Eliz.* 819. *Dy.* 171. *Moor* 911. *Bunb.* 267. After the case of the claim of common in lord *Raymond*, there was another case of *Wilcox v. Walker*, in C. P. *Hil.* 4 G. 3. where it was said, it would do if alleged by way of custom to encourage habitation. The court was of opinion that the inhabitants could not prescribe, but the custom, as laid, was good.

Supra 699.

Jackson S. S. — The first objection to this *modus* is, because it

blends great and small tithes. But there is no case in support of this distinction. The distinction between rector and vicar is not known in law, and exists only in parishes where there is an endowment or prescription. As to the nature of the tithes being different, that can be no objection. It is in lieu of certain tithes for an extent of land. I admit that payment of one tithe in lieu of another is unreasonable and unjust, for it proves the original bargain or agreement to have been an imposition, and the court will not establish it. *Startup v. Doddridge*, *Salk.* 657. The rule is, that the *modus* in lieu of tithes is to be as certain as the tithes themselves, but not more so: the annual value of the tithes is variable, and depends upon a variety of circumstances. *Hardcastle v. Smithson*, 3 *Atk.* 845. 1786.
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Supra 587.
Supra 784.

It is said, that this *modus* is bad, because it may be reduced by the diminution of houses. But it is not to be supposed, that the occupiers of lands in this parish would leave their houses, and reside out of the parish, and thereby subject themselves to tithes in kind. [1280] And the possible diminution of the number of occupiers is not such a circumstance as to prove fraud in the agreement. The substantial difference between this case and that of *Travis v. Oxton* is, that in the latter case a person might be subject to the *modus* who had not that for which the *modus* was substituted. Not so in this case; for every person who pays this *modus* must have an advantage from the tithes, or some of them, that are covered by it. Supra 1066.

Burton S. S. — It is said, we have no right to avail ourselves of this verdict, because it was a collateral finding, and not a direct one. That can have no weight but with respect to costs. It is a direct negative to the parson's claim, and the court cannot decree an account.

The next objection is, that it is for different species of tithes. If this be an objection, it must go to a great number of *moduses* which have been allowed by all courts: every farm *modus* must be so circumstanced. With respect to the names given of "*shot and waren*," it is not easy to say, that names of such antiquity are not confounded. "*Waxen shot*" is, probably, the payment to the rector for finding lights in the church. This appears from the constitution of archbishop *Winchelsea* in *Lindw. Prov. fo.* 95. to be one of those payments often made in lieu of different tithes, and the tithes here covered are more of personal, than predial tithes.

The next objection is as to its uncertainty; which has no weight, because no other species of certainty is required, than that *something* must be payable. There are cases where *moduses* have been declared to be bad, because there was no certainty of any thing: but here there is necessarily something: there must be one *2d.* at least; for if none, then the tithes are payable in kind. It

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may be increased for the parson's benefit, and his duty thereupon increases; as it diminishes, so does his duty. There is a certainty of something, which is as certain as the tithe itself, and it need not be more: the crop is always uncertain: the time is certain, and the person from whom; here it is *every inhabitant householder*: only one other certainty is necessary, namely, the remedy, which is certain, for the tithe is a rate-tithe, namely, agistment.

[1281] The objection most specious and most pressing is its unreasonableness, founded on two things, 1st, because the parishioner pays for the tithe which he has not: 2d, because the houses may be reduced to one: and it is supposed to be so violently unreasonable, that no such agreement could have been made. It is in lieu of four species of tithes upon which the parties may be supposed to have calculated the probability or improbability of the person, who is to pay, having such tithes. But this is so in every case of farm-tithe. Suppose for instance in *Kent*, where the farmer has it in contemplation to cultivate hops, the composition is made on the average. Nothing is more common than a composition for a variety of tithes. Will that be not binding, and so a *modus* not binding, because the farmer does not cultivate all the articles for which the *modus* is payable. It is said, that all the houses may be reduced to one. But, in order to overturn a custom, there must be something grossly unreasonable. There are many things which are unreasonable in the eye of the common law, and therefore bad as by prescription, but yet are good as customs. Now the court will not argue against a custom upon so gross an improbability as that the houses in the parish may be reduced to one. If they should decree upon such an idea, a great many customs could not stand. A custom, that all the tenants should bake at the lord's oven—a custom, that the parson should keep a bull and a boar.—The tenants of the lord's manor might be reduced to one, and it would then be extremely hard, that the lord should be at a great expence in building and repairing his oven; so, the parishioners might not keep cattle to breed. The same reasoning would hold, where a person is bound to keep a bridge in repair in consideration of toll: it happens in many places in the West, that the tolls do not defray the expences of keeping the bridge in repair. This parish is in the fens: it is part of the country called *Holland*. In that part of the country called *The Bedford Level*, the duke of *Bedford* is continually obliged to remit rent to his tenants in consequence of inundations, and in order to induce the tenants to continue there. This parish adjoins to it, and is liable to the same mischief; and an agreement might very fairly and probably be supposed to have existed upon similar considerations. The case of *Travis v. Oxton* wanted the inducement arising from the circum-

stances of this case, and the situation of the parish. That an inducement of this sort is sufficient to support a custom, otherwise bad, will appear from a case in *Lord Raym.* 405. *Weekly v. Wildman.*

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Mitford S. S. — The court has expressed a wish to have the difference considered between custom and prescription with respect to tithes. It is admitted, that the common law may be controlled by custom in other cases, but it is doubted, whether it can be so in the case of tithes. By the common custom of the realm a provision is allotted for the parochial clergy. 1st, The tenth of the *produce of the land*, or *predial* tithes. This is confined to such things as yield a yearly increase, except in a few instances, as saffron, which produces once in three years, and *silva cædua*. 2d, The tenth (not of the immediate produce of the ground, but) of things immediately nourished by the ground, as colts, calves, lambs, milk, eggs, &c. commonly called *mixt* tithes. Personal tithes are not due of common right, except, perhaps, 3d, *Easter* offerings, which are not properly tithes, but the acknowledgment of communicants, and are due of common right. It is clear, that *particular* custom may extend the *general* custom of the realm as to tithes: 1st, Of common right no tithes are due of quarries of stone, or slate, or lead, coals, tin, &c. because not of the *increase*, but of the *substance* of the earth. So, of houses. But, by particular custom, tithes of any of these may be payable. 2d, Of common right no tithes are due of things *feræ naturæ*, even though nourished by the soil, as deer, conies, and the like. But, by *particular* custom, tithes of these may be payable. 2 *Inst.* 651. So, of fish, which partake of the nature of a personal tithe. 3d, Of common right *no personal* tithe is due. It is true that the ecclesiastical constitutions attempted to give a general right to personal tithes. *Constit.* of archbishop *Winchelsea*, *Lindw.* 195. But this was controlled by the statute of 2 & 3 *E.* 6. c. 13. which enacts, “ that
“ every person exercising merchandizes, bargaining and selling,
“ clothing, handicraft, or other art or faculty, being *such kind*
“ of persons, and in *such places*, as heretofore within 40 years
“ have *accustomably* used to pay such personal tithes, or of right
“ ought to pay them (other than such as be common day-labourers),
“ shall yearly, at or before the feast of *Easter*, pay for his per-
“ sonal tithes the tenth part of his clear gains, his charges and
“ expences, according to his state, condition, and degree, to be
“ thereout allowed and deducted. Provided, that in all places
“ where handicraftsmen have used to pay their tithes within
“ 40 years, the *same custom* of payment of tithes is to be observed
“ and continued. Not to extend to any parish on the sea-coast,
“ the commodities whereof consist chiefly in fishing; and have by
“ reason thereof used to satisfy their tithes by fish, but that all

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Supra 1256.

“ such parishes shall pay their tithes according to the *laudable customs*, as they have heretofore of ancient times within these 40 years used and accustomed. The act not to extend to *London* or *Canterbury*, or any town or place that hath been used to pay tithes by *houses*, &c.” Now this act restrains the general law of the canonists as to payment of personal tithes, and clearly considers the title to personal tithes as merely a title by particular custom; and in fact personal tithes are rarely now paid. The tithe of mills may, perhaps, be considered as an exception to this, if taken as a personal tithe. But in fact it is not simply a personal tithe, though to be paid for as such. It is in its nature *predial*: *quia de locis certis percipitur, est prædialis*, *Lindw.*: and it was so considered in *Gaches v. Haynes*. The 9 *E. 2. stat. 1. c. 5.* shews that it is not due of common right. Tithe of old mills is payable only by custom: tithe of new mills by this statute. But *corn-mills* only are within this act: tithes of *fulling-mills*, *tin-mills*, &c. are due only by custom. *Gibs. Cod. 666.*

As *particular* custom may give to the parson the tithes of that which by the *general* custom of the realm he is not entitled to; there seems no reason why particular custom should not *control* general custom as to tithes, as well as other things. It certainly controls general custom to a degree, that is, as to the *manner* of tithing: so that the books in laying down the law upon the subject, state such to be the mode of tithing, unless *the custom of the place is otherwise*, that is, the *common* custom is such, the customs of *particular* places may be otherwise. It should seem, however, that particular customs differing from the general custom of the realm must be coeval with the general custom, and established at the same time with it, and therefore are not to be considered as controlling a general custom *before established*, but, as *the first custom established in that place*, and that in that place the general custom never was established. And upon these principles, that may be good by particular custom coeval with the general custom of the realm, which may not be good by *prescription*, which derogates from the general custom before established. Canonists, who consider tithes as due *jure divino*, admit of a distinction, and that though in *real* tithes a custom to pay less than the tenth does not avail, yet in *personal* tithes it is well enough. *Ayliffe 508.*

But, if *custom* cannot, *contract* certainly may control the *general* custom of the realm with respect to tithes, as well as other rights: and this leads to the consideration *how far* contract may modify the general custom. In speaking of such a contract it must be understood to mean a *contract subsequent* to the establishment of the general custom; for all custom in fact originates in contract: the general *custom* of the realm is the *general contract* by which rights

of property are regulated, though the contract itself is lost in antiquity: *particular customs* are contracts with respect to *particular places*; though the policy of the law will not permit this to be carried to very minute subdivisions, as to the distinct propriety of an individual. Consider the extent to which right to tithes under the general custom may be modified by contract. Prior to the disabling statute of *Eliz.* by the canon law a valid and permanent composition might be made by patron, bishop, and parson. *Ayl.* 508. *Lindw. L.* 3. tit. 16. p. 192. they might bind even the right to tithes, and transfer it to another. *Cro. Eliz.* 599. *Moore* Supra 200. 485.

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The question in the case before the court is, Whether the *modus*, supposing the fact of payment to be true, is maintainable in law. The defendants insist upon a *particular custom* or *contract* controlling, by modifying, the *general custom*, viz. that 2d. shall be paid by every householder, and that tithes shall not be paid of certain things, which, according to common custom, would be due from each householder, more or less. It amounts to a *contract* on the part of the body of *householders*; it is not different from a *custom* that lands shall descend in borough *English*, &c. which is a contract on behalf of the body of owners of lands within the manor, that the lands shall so descend. The first case is a contract with the rector originally, or the person entitled to tithes. The second case is a contract with the lord, of whom the lands are holden. In both, they are the terms upon which the lands are occupied and cultivated. The fact of the contract is determined by the usage in both cases, as it is, wherever the matter rests in antiquity; as a question, whether a mill was erected since the statute of *Articuli Cleri* is determined by the usage of paying tithe or not; a question how personal tithes were paid forty years before the statute of *Eliz.* 6. is determined *a posteriori*, by what has been done all the time of memory since the statute. In this case it is clear, that the custom has prevailed all the time of the memory of persons now living, and long before. The existence therefore of the contract is not questioned. The only question is, Whether this be legal as a *custom* or *contract*? For the purpose of considering this question, consider first the nature of the tithes concerned; first, herbs and fruit in gardens and orchards; second, wood-cuttings, croppings, and toppings of trees; third, herbage and agistment of barren and unprofitable cattle. There can be no objection, except as to the last. Agistment in its nature certainly partakes of a personal tithe: it is the profit of pasture; personal tithes are where a gain or profit is made; agistment is the gain or profit made of the feed of cattle; it is a tenth of the advantage which the cattle have derived from the depasturing, and the owner pays it under an idea of paying a

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Supra 189.

Supra 502.

tenth of the profit he is to derive from the sale; therefore, if cattle depasture in any waste or common ground which is extra-parochial, the tithes of the pasturage are payable to the rector of the parish where the owner inhabits, 2 & 3 E. 6. c. 13. s. 3. if there be not a custom for payment to the contrary. *Sav.* 60. Tithe agistment is payable by the owner of the cattle agisted, *Hardr.* 184. and as the idea upon which the tithe is founded, is the profit gained upon sale, *Cro. Eliz.* 475., 1 *Ro. Abr.* 647., so if fatted for the victual of the family of the owner in the same parish, tithe agistment shall not be paid, 1 *Ro. Abr.* 647., *Cro. Car.* 237. And this privilege extends only to personal tithes, 1 *Ro. Abr.* 650. It seems therefore that agistment is to be considered as a personal tithe; it is the tenth of the profit made, or supposed to be made by sale; and if it be a personal tithe, then the canonists admit that a custom to pay even less than a tenth is good, *Ayliffe* 508. And indeed, of personal tithes it is difficult to ascertain a tenth: it is never rigorously exacted: custom has usually guided the payment; and even in late times it is not accurately settled how it is to be paid, where custom does not ascertain it, *Guilbert v. Eversley*, *Hardr.* 35. so that it is almost necessary to settle by custom what shall be paid, to prevent continual disputes. Of predial or mixt tithes a tenth in specie is payable: a mere division of a tenth part from the rest; but personal tithes are necessarily payable only in money; and the court has been generally at a loss for a rule where custom has not settled the quantum. There is but little reason for a composition with regard to *predial* tithes, for a tenth is easily taken. In *mixt* tithes it is more difficult, and therefore a composition is more common; but in *personal* tithes it is almost impossible to do otherwise.

* Supra 645.

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† Supra 652.

The objections made to the *modus* are five. First, That it is a satisfaction in lieu of great and small tithes, and that they cannot be satisfied by one *modus*. But this distinction of great and small tithes is modern, depending on endowment, &c. Second, That different things are satisfied by it, and that there could be no division of payment; but many *moduses* have been holden good, though liable to the same objection, *Bunb.* 125 *, 161†. Third, The objection to the names of “shot and waxen,” seems too frivolous to be attended to; that because, from length of time, the name is become unintelligible, the custom is to be lost. Fourth, That it is an uncertain and equal compensation to the vicar; and, Fifth, That it is an uncertain and unequal payment by the occupier. These are the only objections that bear the appearance of difficulty. But the agreement being so, it must be a very strong case to overturn an agreement acquiesced in from time immemorial, in order to which it must have been originally unfair, not become so by subsequent accident. There is no difficulty in ascertaining

what pasturage, what wood, or what garden is exempted; it is the pasturage, the wood, the garden of the inhabitant-householder; therefore, there is no such difficulty as in *Carleton v. Brightwell**, which was a payment for lands *usually* occupied with the tenements. The case which presses is that of *Travis v. Oxton*†; but that was a farm *modus*, and if laid as annexed to an ancient farm, might have been maintainable, otherwise clearly not. But this is a contract on behalf of the whole body of householders; and the payment must be equal to the population of the parish, and the cultivation of the land, and unless the place is supposed to be deserted, must continue. Population increases with increase of cultivation: increase of population increases the payment; therefore, the increase of payment is equal to the increase of cultivation; and as tithe is equal to cultivation, the payment must be equal to the tithe. A certain number of persons being necessary to cultivate a certain quantity of land, therefore a certain number of householders must pay; the number of inhabitants to occupy certain quantities of land must be always nearly the same, and every householder pays. Householders must occupy all the lands, except those unoccupied by non-residents who pay tithes in kind, and that exception is therefore in favour of the vicar. And the exception was reasonable, for the vicar had not his *Easter* offerings from non-residents, which were formerly a considerable object; and it proves the inducement, namely, the increase of habitation. Therefore, if the agreement, when first made, might have been reasonable, its becoming unreasonable by alteration of circumstances, *viz.* change in the value of money, cannot be avoided; for by those means almost every *modus* might be overturned. It is said that all the lands might be occupied by one householder. This is not to be supposed possible, but if they could, the cultivators must be resident, and there would be as many householders inhabitants as if divided into a number of farms. With regard to the other objection, that the *modus* is unreasonable with respect to the occupiers, I may suppose this property to have belonged originally to one lord, who contracted for himself and his tenants, *Pigot v. Hearne*. But if otherwise, if the contract were made by all the parishioners, and they chose to subject themselves to a greater payment than was due of common right, they might do it, and it is binding upon all who claim under them. So is the custom to pay 4*d.* or 6*d.* a-head for *Easter* offerings, or the custom to pay tithes for things not *de jure* tithable. This payment, therefore, whether considered as a custom or a contract, ought to be established.

[As to the objection to the second *modus*, it was answered by the defendant's counsel, that this *modus* arises from the old ecclesiastical law with respect to the mode of tithing sheep. The only tithes

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* *Read.*
Supra

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† *Supra*
1066.

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Supra 200.

1 Anstr.
Rep. 325.

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understood to be due were wool and lamb. If sheep were removed from one parish to another between the times when those tithes arose, the clergyman of the one parish paid a certain proportion of the wool to the clergyman of the other, or money in lieu of it; or the parishioner might make a recompence for the wool lost by the removal. This *modus*, they said, is evidently of the latter description, and was not considered as an agistment *modus* at all. Both the *moduses* may therefore have had a reasonable beginning, because they were then understood to cover different things, although it is now known that the language in which the first is found would cover both. If the whole is covered by the first *modus*, the second is superfluous, and may be rejected; it cannot invalidate the first.]

The court having taken time to consider of this case, the judgement was delivered on *Monday* the 17th of *July* 1786, by *Eyre B.* in the absence of the Chief Baron.

Eyre B. — This is a bill by the owner of the impropriate rectory of *Long Sutton* in the county of *Lincoln*, who is also lessee of the vicar, and by the vicar, against an occupier, being an inhabitant householder, for three species of tithes. First, The tithe of agistment of fat and store sheep fed and depastured in the parish from shearing time, and removed before *Candlemas*. Secondly, The tithe of agistment of all bullocks, barren cows, horses and mares, not used in husbandry. Thirdly, The tithe of agistment of colts, heifers, and other unprofitable cattle. As an answer to the demand of the second and third species of tithes the defendants allege, that within the parish there is, and time out of mind there hath been a certain custom or manner of tithing, that every person being a householder inhabiting within the said parish, and occupying any messuage, cottage, garden, orchard, yard, land, meadow, pasture, or marsh-land, within the said parish and tithable places thereof, hath paid, and hath been accustomed, and of right ought to pay, to the vicar of the said parish, 2*d.* at *Easter* in every year, or on demand after, by the name or names of *hearth silver*, *garden silver*, and *shot and wagen silver*, in lieu and full satisfaction of all tithes of herbs, flowers, roots, apples, pears, plums, nuts, and other fruits, in or upon any gardens, orchards, or yards occupied by such person within the said parish yearly increasing; and of all wood cuttings, croppings and toppings of trees cut in such year on lands occupied by such person within the parish; and also of herbage and agistment of all barren and unprofitable cattle kept, fed and depastured by such person in the said parish, and the tithable places thereof in such year; which 2*d.* hath been accepted in lieu and full satisfaction of the tithes aforesaid. The parties agree to consider the *modus* as found by the verdict. The legality of it is the question in this cause.

It has been urged as an objection to this *modus in point of law*, that it is one entire payment for three distinct species of tithes of different natures, without ascertaining how much for each, and the payment in fact admitting of no integral division and apportionment; that it is a confused aggregate of several distinct payments marked by different names, distinguishing the different purposes to which each was applicable; that it is unreasonable, being unequal and uncertain in point of provision for the vicar; that, as applied to land, it is floating, covering an uncertain quantity of land, depending upon the accident of the parties occupying more or less; whereas it is said, where a *modus* is pleaded to cover land, the land ought to be specific.

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The argument in support of the first objection rested altogether upon the reason of the thing, no authority was cited. It must be admitted that there is reason to imagine that the *hearth silver* and *garden silver* which are known, and familiar denominations of *moduses* for the tithe of fuel spent in houses of the inhabitants, and for the tithes of gardens and orchards, were, in their first establishment, distinct payments. *Shot* and *waxen silver*, terms less in use, whatever be their true import, must have been in their origin distinct from the two former, and, not improbably, were different in themselves. Whether the payment now insisted upon of the sum of 2*d.* is capable of an integral division and apportionment to the several species of tithes covered by it, will depend upon the matter of fact, Whether these species of tithes were three or four in number? Considering fuel and wood as two, it is in fact at this day [1289] applied to four, *viz.* fuel, gardens, wood, agistment. Supposing the payment of 2*d.* to be capable of a strict apportionment, it would follow that four distinct payments have been combined into one aggregate sum of 2*d.* Supposing it not to be capable of such an apportionment, it must then be concluded, that the distinct payments were at some time or other compounded for by a gross sum. What is the conclusion of law, which is our only consideration at present, upon this analysis? This only, Whether the combination or composition took place before time of memory or not? If it took place before time of memory, it is just as binding as the separate payments would have been. If it took place since time of memory, it would be in the nature of a temporary composition, which being determined by either vicar or inhabitant householder, the separate payments would revive.

If this is to be the result of our speculations and theories upon this payment, it is hardly worth the care, pains, and expence that have been bestowed upon it. This inquiry might have been stopt *in limine*, by observing that it went to matters of fact, not of law, and that the fact is concluded by the admission that this has been an

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immemorial payment. It was much pressed upon us, that we are not concluded by an indorsement to this effect in a former cause. It is enough that we are concluded by the admission in this cause. Taking it then as an immemorial payment in satisfaction of the tithes to which it has been in fact applied, What is the distinct objection to it in point of law under this head of objection? Can it be objected that there can be no valid composition for several distinct species of tithes by one entire payment? Or, can it be objected, that this payment may not be called, known, or distinguished by any denomination which the parties think fit to annex to it. All the tithes of a parish, a district, a farm, a messuage, a garden, may be satisfied by a *modus* consisting of one entire sum, more or less. So may part of those tithes — the great — part of the great — the small — part of the small. Why not some great, some small? As to the denomination, it is enough to say, that it is probably arbitrary. Upon the whole, we are perfectly satisfied that this *modus* is not to impeached upon this head of objection.

[1290] The next objection is, that the *modus* is unreasonable, being, as it is alleged, unequal and uncertain in point of provision for the vicar; and uncertain in another respect, as extending to cover the tithes of an indefinite quantity of land, whereas land covered by a *modus* ought to be specific land.

There is this inequality in this *modus*, that a mere inhabitant-householder, without a foot of land, pays as much as the inhabitant-householder who occupies the largest farm in the parish; and there is this appearance of its being unreasonable, that the mere inhabitant-householder seems to pay for tithes where he has not all the tithable matters for which his payment is a satisfaction. It is rather for the parishioners than for the vicar to state these objections; but, from whatever quarter they come, they prove too much. There can be no parochial *modus*, by a gross money-payment, to which these objections will not in some degree apply. In the most familiar instances, the *hearth-penny*, and *garden-penny* — one hearth pays as much as twenty; the cottager who raises a few potatoes upon a slip of ground, pays that which is a satisfaction for the tithe of the whole produce of his opulent neighbour's kitchen-garden. If the necessary consequence of this kind of *modus* is to be converted into an objection to the validity of it, it must follow that there can be no such *modus*. In truth, however, there is nothing of substance in these objections. The inhabitants householders have entered into a composition with the vicar for these tithes for a money-payment, rated upon them in their characters of inhabitants householders, with perfect equality. They are all equally capable of taking the benefit of it. No one of them can prescribe for more tithable matters than another. The main end and purpose of these com-

positions is, to avoid all reference to the quantity of tithable matters actually produced.

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The objections which seem immediately to concern the interest of the vicar deserve more attention. If this *modus* is uncertain in point of provision for the vicar; if it shifts and fluctuates so as to hazard that provision, it ought not to be established. It is said to be uncertain, because the number of inhabitants householders may be reduced, in consequence of which the composition to the vicar will be reduced. Undoubtedly, if the number of householders are reduced, and the reduced number of householders occupy as much wood-land, and agist as many unprofitable cattle as the original number did, the vicar will sustain a loss. On the other hand, he certainly gains by an increase of the number of houses, and he may not lose by the reduction; for, if the land occupied with the decayed houses fall into the occupation of *out-towners*, he will receive tithes in kind from those lands. The vicar has therefore, upon the whole, rather the advantage in the speculation upon [1291] the decrease or increase of the number of houses. But the answer given at the bar to this objection is the true one. *The recompence is certain to a common reasonable intent, and more is not required.* They are Lord *Hardwicke's* words in *Hardcastle and Smithson*, 2 *Atk.* 246. The possible reduction of the number of inhabitants householders is too remote a consideration. Two houses in particular may decay and may not be rebuilt, and the *modus* depending upon the existence of two such houses may therefore be objected to for want of certainty of duration, which was the case in *Cro. Eliz.* 139.; but the inhabitants householders of a town or vill are perpetual in contemplation of law: customs and usages, which are perpetual, attach upon them.

Supra 784.

The uncertainty in respect of the quantity of land covered by this *modus*, its being shifting and desultory, and the application of the case of *Travis v. Oxton*, which is the latest authority upon that subject to the case now before the court, are the points upon which our opinion has been suspended.

Supra 1066.

That species of *modus* which is vulgarly called a farm-*modus*, admits of no uncertainty or variation in the quantity of land for the tithe of which it is a satisfaction. Therefore a *modus* for lands usually holden with a certain messuage, which was the case in 2 *P. Wms.* 462. was holden to be a bad *modus*. This kind of *modus*, stated correctly in prohibition, would be pleaded as a prescriptive payment, that *A. B.* and those whose estate he hath in the particular lands have, time out of mind, paid so much in satisfaction of such or such tithes arising on those lands. This is what in the old books is, perhaps, quaintly enough expressed by the term prescribing in a *que estate*. In plain *English*, the right or privilege claimed by pre-

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scription, is claimed as annexed to and going along with the particular lands. This suggests a satisfactory reason for insisting upon the certainty of the land. Such a prescription can no more exist without certainty in the lands to which it is annexed, than shadow without its substance. Here the observations suggested at the bar, that there was a difference between *moduses* which are strictly prescriptive and those which are established by the custom of the place, will be found to have a material application. There is clearly this difference between prescriptive and customary *moduses*, that these last are not annexed to the lands which they cover: they exist in notion of law independent on the lands by force of the custom prevailing within the particular district. Such a custom is as necessarily attached to a certainty of district, as a prescription is to a certainty of particular lands. In pleading it would be said, that there was a certain laudable custom used, time out of mind, within such a town, parish, vill, &c. There are many other points in which certainty is necessary to support a custom, that is, to make it appear sensible, and not unreasonable; but they are only so far necessary. In the case of all customary *moduses*, and of this in particular, which, purporting to give a common right to all the inhabitants householders, is undoubtedly a customary, and not a prescriptive *modus*; certainty of the thing for which the recompence is given, and also certainty of the recompence itself, are necessary. Here there is a fixed and certain recompence (for so we have held the payment of 2*d.* by the name of *hearth silver*, &c. by every inhabitant householder to be), for all the tithes of the particular species due from all the inhabitants householders within the district. It is true, that the 2*d.* paid by an individual inhabitant householder is not a satisfaction for the tithes of specific lands, as in the case of a farm *modus* it must be, nor even of a fixed quantity of land, nor do the interests of the vicar, nor any necessary purpose to be answered by it, require that it should be so. It is perfectly indifferent to the vicar, whether an individual inhabitant householder occupies this year the same land he occupied in the preceding year, whether he has more or less. This recompence for the tithes of the whole land, occupied by persons of that description, is known and fixed by reference to something else which is to a common intent certain, *viz.* the number of inhabitants householders; and this recompence is precisely the same, whether the individuals who pay occupy more or less.

One uncertainty still remains, that is, in the quantity of the whole land occupied by the whole body of inhabitants householders, which may be more or less in different years, even in the same year; and in this respect this *modus* may be still said to be shifting and desultory. We must cut this knot, rather than pretend to

untye it. It must be taken to be an answer to this objection, that all the cases in which a different rule of tithing has been established between out-towners and in-towners, are liable to the same objection, and it is now too late to shake the authority of those cases. Thus much I will say upon it. — It imposes no real hardship upon the vicar: the occupation of lands is a thing of public notoriety: it must be known to the vicar: the fluctuation is probably reciprocal; and he will gain in one way what he loses in the other.

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The application of the case of *Travis v. Orton* remains to be [1293] considered. In that case a *tilth-penny* payable by the occupier of an ancient messuage having mowing lands occupied with it, in satisfaction of the tithe of hay, was holden to be a *bad modus*; and I think that it was rightly so holden: the reasons I will not now repeat. There is this clear line of distinction between the two cases apparent upon this general state of the case of *Travis v. Orton*. There, the payment was confined to houses having mowing lands; consequently, if the mowing lands were taken from the house, the house paid nothing, and the share to which they were added, paid no more than it did before. The recompence to the vicar in that case was so little fixed and certain, that it might have been reduced to a single *tilth-penny*. In this case, let the occupation vary as it may, the recompence remains the same. It is no part of our consideration whether it be sufficient in value; that was the concern of the original contractors; we have only to see that the contract is sufficiently precise and certain, that the parties may have the benefit of it, such as it is, at all times (a).

The result of the examination of the *modus* in question is, that it is in point of law a good and valid *modus*.

In answer to the demand of an account of the tithe of agistment of fat and store sheep fed and depastured in the parish from shearing time and removed after *Candlemas*, another *modus* is pleaded, viz. that every person occupying lands within the parish, being resident within the parish, and having sheep fed and depastured there, which have been shorn within the parish in any year, and have been sold and sent out of the parish after the 13th of *February*, commonly called, *Old Candlemas-day*, in the next year and before the next shearing time, or which have been bred in the parish or brought into the parish after shearing time in any year, and sold or sent out of the parish after the 13th of *February*, commonly called, *Old Candlemas-day*, and before the next shearing time, hath paid, and for all the time aforesaid hath been accustomed to pay, and of

(a) But see *Blackburn v. Jepson*, 17 Ves. 476. *Travis v. Orton*, *supra* 1066. See also *Layton v. Parsons*, 18 Ves. 173. *infra*, which appears to have escaped attention in *Williamson v. Lord Lonsdale*. *infra*, and *Williamson v. Lord Lonsdale*, 5 Pri. 25. *infra*; in both which cases the court considered the case in the text irreconcilable with

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right ought to pay to the vicar of the parish, the sum of 3*d.* for every such sheep in lieu and full satisfaction and discharge of the tithes due and payable to such vicar for such sheep, and such payment hath been accepted by such vicar in lieu and full satisfaction of the tithe aforesaid.

[1294] Mr. *Ainge* objected to this *modus*, that it was inconsistent with the other *modus*, which is alleged to be in full satisfaction of all tithes of herbage and agistment of all barren and unprofitable cattle, and, consequently, includes sheep.

The objection is palpable; but this is not the time for taking it. It goes to prove that both these *moduses* cannot in fact exist together; but it does not prove, that either of them is bad in law. If they were before a jury they would probably be made consistent by the form of negating the more general *modus* as laid, and indorsing on the *Postea* the very same *modus*, with an exception only as to the sheep which fall under the particular *modus*. The fact of these *moduses* being admitted in this case, and they, being so very easily reconciled, and both taken together amounting to a good defence against the demand made by this bill of tithes in kind, it follows, that this bill, so far as it seeks an account of tithes of agistment, must be dismissed with costs: but, the defendants having insisted on the several *moduses* set forth in the pleadings, and the fact of such *moduses* being admitted by the plaintiff, and the same appearing to the court to be good and valid *moduses*, it may be referred to the Deputy Remembrancer to take the account on the foot of such *moduses*, and the consideration of the costs of taking such account and subsequent costs may be reserved, till the Deputy Remembrancer shall have made his report.

25 Geo. III. A. D. 1785. Dom. Proc.

Collins, Clerk, v. Sir Henry Gough, Bart. and others.

S. C.
7 Brown's
P. C. 94.
(2d edit.)
The court
is not con-
cluded
from direct-
ing an issue
to try a
modus by a
decree for
an account
in a former
cause in
which the
same *modus*
was insisted
upon, but
no issue
directed.

THE respondent, sir *Henry Gough*, filed his bill in the court of Chancery in *Easter* term 1778, against the appellant, as vicar of *Claverdon* in the county of *Warwick*, and Dr. *John Warren*, the archdeacon of *Worcester*, as rector of *Claverdon*, setting forth, that in the year 1755, sir *Henry Gough*, deceased, (the respondent's father) became seised in fee by purchase from *John Parker* (*inter alia*) of the manor of *Kington*, and a messuage and lands thereto belonging called or known by the name of *Kington Farm*, or *Kington Grange*, or *Kington Grange Farm*, situated in the parish of *Claverdon* (except a very small part of the said farm, which had been exchanged for other lands previously to such purchase): that the said sir *Henry Gough* (the respondent's father) died in *June* 1774, leaving the respondent his eldest son and heir at law, who, as such, thereupon

became seised in fee of the said farm (except as aforesaid) and had ever since been so seised thereof: that the said farm was an ancient farm, and had from time immemorial consisted of the house, and several pieces or parcels of land particularly described in the bill by their names and quantities: that two of the pieces of land, parcel of the said farm and in the bill also particularly described, had been conveyed by indenture of the 10th of *March* 1721 by *John Parker* (the then owner of the said farm) to *Andrew Archer*, in exchange for two other small pieces of land in the bill also particularly described, which had ever since the exchange been holden with *Kington Farm*: that the proprietors of *Kington Farm*, or their farmers thereof, from time immemorial has been accustomed to pay, and had paid every year on the *Feast-day* of *St. Thomas* to the vicar of *Claverdon* for the time being a *modus* of 13s. 4d. in lieu, full satisfaction and discharge, and in the name and stead of all the privy or small tithes arising upon the said farm: that no tithes in kind had at any time been paid for the said farm before the year 1773, and then only upon the occasion after-mentioned, nor had any ever been demanded for the said farm by any former vicar: that the vicarage of *Claverdon* having become vacant in the year 1768 by the death of *William Cumming*, the last incumbent, the appellant was presented thereto in *October* 1768 by the reverend *Dr. John Tottie* (the then archdeacon of *Worcester*); and that since the appellant had been so presented, he had claimed to be entitled to the tithes of all tithable matters (except corn, grain, and hay) arising within the said vicarage: that accordingly in *June* 1773 he had filed his bill in the court of Chancery against the said late sir *Henry Gough* and against the respondent *Canning* (his tenant) and several other persons, (which suit after the death of the said late sir *Henry Gough* was revived against the respondent) praying an account of all tithable matters (except corn, grain, and hay) which had been had and taken by the said several defendants since the death of the said *William Cumming*, and that they might be decreed to pay him the value of the tithes of all such tithable matters by them respectively had and taken, and that his right to the said tithes might be established: that the defendants had put in their answers to the said bill; and that the said late sir *Henry Gough* and *William Canning* had insisted by their answers that they were not bound to pay the said tithes, and had alleged, that an ancient immemorial payment or *modus* of 13s. 4d. *per annum* was paid and payable in lieu of all vicarial or small tithes arising from the lands of sir *Henry Gough* within the parish of *Claverdon* (except the lands which had been so taken in exchange) and for *Easter* offerings; and that no former occupier of [1296] the said lands had at any time paid any tithes in kind arising from

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the same: that the appellant having replied to the said answers, issue was joined, and the cause afterwards came on to be heard on the 27th of November 1777 at the Rolls, when sir Thomas Settle (the late Master of the Rolls) had been pleased to decree, that the respondent, as personal representative of the late sir Henry Gough, and William Canning, his tenant, should account with the appellant for the tithes of the said lands since the death of the last incumbent, William Canning. The bill then stated the foundation of the decree made by sir Thomas Settle at the Rolls to be, that the said respondents, sir Henry Gough and William Canning, had not (and the bill charged, that they had not) in the answers of either of them distinguished or ascertained of what pieces of land the said farm, called *Kington Farm*, consisted, nor set forth with certainty what lands in particular were covered by the said *modus* of 13s. 4d.; and also, that it was by the answer of the said sir Henry Gough alleged, that all the proprietors of the lands of the said sir Henry Gough, lying within the parish of *Claverdon* (except the lands before excepted) or their farmers, had paid time out of mind every year to the vicar of *Claverdon* aforesaid a certain sum of 13s. 4d. in lieu of all vicarial or small tithes arising upon the said lands, and for *Easter* offerings; but that it was not stated or alleged by the answer either of the said sir Henry Gough or William Canning, his tenant, that the said sir Henry Gough had not lands within the parish of *Claverdon*, other than and besides the lands of which the said farm, called *Kington Farm*, consisted, and to which farm only the said *modus* (as appeared by the proofs taken in the said cause) extended. The bill then charged, that no tithes or any *Easter* offerings had ever been paid for the said farm, called *Kington Farm*, to any former vicar, or to the appellant, except in one instance, and that upon the following occasion, viz. that the appellant on *Good-Friday* in the year 1775 (being a short time before filing his bill) had sent his servant to *Kington Farm*, where the respondent Canning lived, to demand tithe-eggs, and that the respondent Canning not being then at home, and the appellant's servant seeing Canning's mother, had assured her that eggs and fish were excepted out of the *modus* payable for the said farm, and that the appellant would return or pay for them, if they were not his right, and that if the demand was not complied with, the appellant would file a bill against the respondent Canning: that thereupon the respondent Canning's mother complied with the said demand: and also except, that on the 25th day of May 1775 the respondent Canning from like threats and insinuations was prevailed with to account with and pay the appellant a sum of money for *Easter* offerings, which was the only payment ever made for *Easter* offerings in respect of the said farm. The bill therefore

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prayed, that the said *modus* of 13s. 4d. might be established, and that the appellant might be decreed to accept the same, the respondent offering by his bill to account with him for the same.

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To this bill the appellant, as to the *modus* of 13s. 4d. thereby prayed to be established and accepted in discharge of all the privy or small tithes of or arising on the said tenement and farm called *Kington Grange Farm*, with the lands, wood, and appurtenances thereto belonging and therewith holden in the parish of *Claverden*, and particularly described in the plaintiff's bill, except such parts as in the said bill were mentioned to be exchanged for other lands previously to sir *Henry Gough's* purchase, or which prayed any relief against him, or sought the discoveries in the bill prayed relative thereto, *pleaded in bar* the bill, answers, proceedings, and decree in the former suit, in which the appellant was plaintiff, and had obtained the decree against sir *Henry Gough* and *William Canning* for payment of tithes in kind, and averred, that the *modus* in both suits was for the same lands, and that the decree in the former suit was made upon the full merits of the case, and upon reading the evidence offered on both sides; and that the said decree was duly enrolled, and in full force, unreversed, and unappealed from.

This plea was argued before the Chancellour *January* 14, 1779, and was over-ruled; after which the appellant put in his answer, and denied the *modus*, and claimed a right to tithes in kind; and in support of such claim, he stated the composition real, and the pension of 18s. 4d. granted in lieu of rectorial tithes, and that by the same instrument the vicar's right to all other tithes was expressly reserved: he also stated two terriers on oath in 1585, subsequent to the disabling statutes, certifying the vicar's right to all tithes throughout the parish, except corn and hay, without any mention of a *modus*, and denied the whole equity of the bill, and stated the several decrees which he had obtained in confirmation of his right, and the subsequent payment of tithes in kind in pursuance thereof to the time of putting in his answer, and insisted on the several matters aforesaid, and particularly on the decree of *November* 1777, (which, he insisted, was solemnly determined on the full merits, and not on the supposed grounds pretended by the respondent's bill, and which decree was duly enrolled, unreversed, and unappealed against,) as an effectual bar to the claim of the said sir *Henry Gough* as full as if specially pleaded; and averred, that the *modus* set up by the respondent's bill was the very same *modus* which was insisted upon in the former cause, and that the very same matters and questions were in issue, and solemnly and judicially decided in that cause; and stated the *Tithe-Book* of Mr. *Pilking-ton*, a former vicar, from 1629 to 1685, wherein there were nume-

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The defendant, Dr. *Warren*, put in his answer, and disclaimed all right to any other tithes, except of corn and hay, and admitted the appellant's right, as vicar, to all other tithes.

The respondent, sir *Henry Gough*, did not reply to Dr. *Warren's* answer; but he did reply to the answer of the appellant, but did not examine one new witness, and the cause was set down for hearing on the very same evidence as the former cause (*m*), an order having been made to confirm an agreement between the parties as to the evidence to be read at all future hearings.

[1299] The cause coming on to be heard before the Chancellour on the 17th of *April* 1780, and it appearing that a very small part of the farm for which the *modus* was payable had been conveyed in exchange to *Andrew Archer*, as stated in sir *Henry Gough's* bill, and that the same was then holden by the respondents, the *Archers*; it was ordered, that the cause should stand over, with liberty for the respondent, sir *Henry Gough*, to amend his bill as he should be advised, with a view that the representatives of the said *Andrew Archer* (now respondents) might be brought before the court.

Sir *Henry Gough* accordingly amended his bill by adding, as parties defendants thereto, the respondents, the *Archers*, (who were co-heiresses of the late lord *Archer*, who was the devisee in fee of the said *Andrew Archer* of that part of the said farm which had been conveyed to him in exchange as aforesaid) and *William Oakley*, their tenant thereof, and *William Canning*, the respondent sir *Henry Gough's* tenant, and *Brownlow*, then bishop of *Worcester*, the patron of the archdeaconry. The cause came on again to be heard, when the Chancellour ordered it to stand for judgement, with liberty for the appellant to apply in the mean time to have his plea re-argued; and the appellant having accordingly applied by petition for that purpose, the same came on together with the cause to be heard for

(*m*) That evidence, on the part of the appellant, was, the composition real alluded to in his reasons offered for reversing the decree, and two terriers of 1585, the one relating to the vicarage and signed by the then vicar, the churchwardens, and two other parishioners; the other relating to the parsonage, and signed by the churchwardens, the sideman, and four of the parishioners. In the former, which appears to have been only on the vicar's oath, was this entry, viz. "To the fourth he saith, that the tithes of the said vicaridge are not leased out, nor, to his knowledge, ever were; and their belongeth to the same vicaridge all manner privy tithes within the said parishe, corne and hay excepted." In the latter there was this entry: "There is belonenge to the same" (meaning the vicarage) "all the privy tythes of the parishe, all such before named are received by the

"minister for his maintenance." On the part of the respondent were produced receipts by a former vicar in the beginning of this century for the sum of 13s. 4d. *eo nomine*, as a *modus*. There was also the evidence of the administratrix of that same vicar, and of the widow of *Cumming*, the late vicar, that this sum of 13s. 4d. had been paid and accepted by the vicar as a *modus*. The purchase deeds from *Parker* in 1755 were likewise produced, in which was a covenant from *Parker*, that the estates were exempt from tithes, and subject to a moiety of 13s. 4d. in lieu of the great tithes, and to a *modus* of 13s. 4d. in lieu of small tithes, and to a *modus* of 2s. 8d. in lieu of both great and small tithes of other part of the premises. It seems, that this was the first title deed in which tithes were mentioned.

judgement on the 6th of *March* 1782, when the former order, by which the appellant's plea was over-ruled, was affirmed, and an issue was directed to try the validity of the *modus*.

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Gough.

From this decree there was an appeal to the House of Lords, the appellant insisting that it was erroneous, and that it ought to have allowed the plea in bar; and instead of directing an issue to try the *modus*, ought to have dismissed the respondent's bill with costs, for the following reasons: As to the plea — because the defence, which was set up by the respondent to the former bill brought by the appellant to establish his right to tithes in kind, was precisely the same as the case made by the respondent's present bill, namely, that the appellant's claim of tithes in kind was barred by a *modus* of 13s. 4d. yearly; and there is no substantial variation in the manner in which it is set out in the one and the other. If that defence had appeared to be in any respect well-founded or maintainable, the court, instead of decreeing in the first cause an account and payment of tithes in kind, after a very long and solemn hearing of the merits (and not for any want of form in setting out the *modus*, as now suggested by the respondent) would have dismissed the appellant's bill, or have at least directed an issue to try the *modus* at law, which the court might have done (as has been done in many instances) even supposing the *modus* not exactly set out in the strict and accurate form of pleading. The plea therefore was proper to prevent the court from proceeding to hear the second [1300] cause upon the same subject matter which had been before solemnly decided, and upon the very same evidence, in favour of the appellant's right to tithes in kind, between the very same parties in the former cause, and was the direct matter in question in that cause: and that decree being enrolled, and in full force, and unappealed from, further proceedings in such a case would not only be vexatious and productive of endless litigation and expence, but of dangerous consequence, and might occasion contradictory and inconsistent decrees, which ought most carefully to be avoided.

Upon the merits — 1st, Because an issue ought not to have been directed to try the validity of a *modus*, which appears from the whole of the proceedings to want the essential characteristic of a *modus*, viz. its being founded on a composition real antecedent to the statute of 13 *Eliz.* which is the foundation of every *modus* subsisting at this day throughout the kingdom. The instrument in 1474, in the archives of the church of *Worcester*, entitled “A composition real between the archdeacon of *Worcester* and the abbot and convent of *Bordesley* of and concerning the right of receiving tithes within the parish of *Claverdon*,” is evidence and acknowledgement under the seal of the then owners of the land, under whom the respondent derives title, and of the patron and ordinary, that tithes then were,

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and had been accustomed to be, paid to the vicar; and thence, and from the terriers, which appear to be answers returned on oath to the bishop's Articles of Inquiry in 1585, after the disabling statute of 13 *Eliz.* it appears that tithes in kind were due and paid subsequent to the statute. It could therefore answer no purpose to take the opinion of a jury on a question of a *modus*, which evidently appeared not to exist in 1585, after the disabling statutes, and must therefore be in itself so substantially bad, that it could not be made good by any trial at law; and must necessarily put the parties, both appellant and respondent, to very great and unnecessary expence and trouble. 2d, Because the appellant's right to the vicarial tithes, as claimed by him, is admitted by the answer of Dr. *Warren*, the rector, and confirmed by the evidence of the composition real, the terriers, the grant from the crown in 1585, and the respondent's own title deeds; and, lastly, by the decrees enrolled in 1777, and the payments of tithes ever since. And no sufficient evidence has been adduced on the part of the respondent to contradict it, or to

[1301] shew, that what is now set up as a *modus* was any thing more than personal agreements or temporary compositions from time to time since the disabling statutes. And if there had been no such apparent objection to the *modus*, yet the respondent's evidence was too imperfect and defective to warrant such an issue as is directed; especially, as the *modus* is set up as an entire *modus* for lands which have been since subdivided and become the property of other owners, without any notice taken in the conveyances of the parts conveyed of their being subject to, or covered by, any *modus*; and for those separated parts the tithes in kind have been paid to the vicar.

The respondent, sir *Henry Gough*, in affirmance of the decree, insisted — 1st, That there is not a single instance of any tithes having been demanded from, or paid by, any owner or occupier of *Kington Farm* at any time before the year 1773; in which year, in order, as it should seem, to give some colour for the claim which was afterwards made, a few eggs and *Easter* offerings were obtained from the mother of *Canning* the tenant, in the absence of her son, by means of false assurances, accompanied with menaces of a suit in case of non-compliance. This single instance of a demand and payment of tithes was on *Good Friday* in the year 1773, and the appellant's bill was filed in the month of *June* following. 2d, If the decree of the Master of the Rolls for an account of tithes had been made after an issue directed to try the existence of the *modus*, and a verdict found against the *modus*, such a decree might have been conclusive, and might have settled the right in question between the parties, upon the true and real merits of the cause; but, inasmuch as sir *Thomas Sewell's* decree was merely for an at-

count of tithe in a case where the existence of the *modus* had never been tried, and the *modus* itself was imperfectly stated, and the lands alleged to be covered by it were not accurately set forth or described in the answer of sir *Henry Gough* or his tenant; such a decree for an account ought not to have the effect of binding the right, and more especially in a case where tithes in kind have never been paid within the memory of man, except in the recent instance above-mentioned. 3d, The plea of a former decree for an account of tithes subtracted, being pleaded in bar to a bill for establishing a *modus*, is clearly insufficient, as every plea which is set up in bar to a plaintiff's demand, must be *ad idem*; and therefore, in the present case, it ought to have been shewn by the plea, that the former turned upon the existence or non-existence of the *modus*, [1302] and that this was the *res judicata* in the former suit in which the decree to account for tithes was made.

The decree was affirmed.

Tr. 26 Geo. III. A.D. 1786. Scac.

Worrall v. Nicholls. [MS.]

BILL by the lay-impropriator of *Clifton* near *Bristol* praying an account for two years composition, for tithes of defendant's farm at 2s. 6d. in the pound according to the rack-rent. Defendant insisted in his answer that the composition had been of many years standing, long before plaintiff became impropriator, and was not variable according to the rise and fall of rents, but was determined by the quantum of the rents at the time of making the agreement. It was proved that some others in the parish had paid various sums at various times according to the increase of their rents, and it was also proved that the defendant had delivered three different accounts of the lands in his occupation and the amount of his composition, which by his answer he alleged was occasioned by inadvertency; one, about 10l.; a second, about 13l.; a third, more than that; and he alleged that he had tendered 27l. for the two years in arrear. Mr. *Mansfield* for the defendant insisted principally, that the discovery once obtained, it was a question solely at law, the subject of an assumpsit. But *per Cur.* — Tithes are a proper subject of the jurisdiction of this court: why not then *modus*es and compositions for tithes? The discovery was necessary; the right is clear in consequence of the discovery and evidence, the account therefore is consequential. As to the costs, if the sum due exceed the sum tendered, costs ought to follow: let the Deputy Remembrancer therefore inquire when the tender was made, whether before or after the bill was filed, and let him take the account reserving the costs.

Where a bill is filed for a composition of so much in the pound, according to the rent of the lands, the account is consequential to the discovery, as well as in the case of tithes in kind.

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Brock
v.

Richardson.

If a *modus* be not proved as laid by the plaintiff in a suit in prohibition, there must be a verdict for the defendant; but if any *modus* be found, though different from that laid, that is a ground for the court to refuse a consultation.

* Supra
180.

M. 27 Geo. III. A.D. 1786. B.R.

Brock v. Richardson. [1 Term Rep. 427.]

THIS was a suit in prohibition; and the question was whether within the chapelry of *Witton Gilbert* there is a *modus* for every inhabitant to pay three halfpence for every milch cow at the time of calving in full satisfaction for the tithe of calves?

At the trial of this cause at the last assizes at *Durham* before *Heath J.* there was no contrariety of evidence; and the jury found the *modus*; with this variance, that it was payable at *Easter*, and that it did not extend to certain lands within the chapelry, called *The Copse Lands*, consisting of five farms, which were exempted from the payment of these and all other tithes. Verdict for the plaintiff, with liberty to move to set it aside in this court without costs.

Wood having moved to set aside this verdict on the ground, that as this was a claim by prescription, the jury ought to have found the *modus* as laid in the declaration or not at all;

Chambre now shewed cause. — The variance between the *modus* laid and that proved is no ground for a new trial, or to entitle the defendant to a verdict. An issue in prohibition to try a particular *modus* is extremely different from issues in other suits; for, whether one sort of *modus* or another be found, it is equally a reason to warrant the prohibition, **Dy.* 170., *Hob.* 192., 1 *Ventr.* 32. (*Anon.*) The very ground on which a prohibition is prayed for is a suggestion that the ecclesiastical court is proceeding to try a question of which they have no cognizance. The fact which is tried in suits in prohibition is merely for the information of the court. This is in some respects like an issue directed by the court of chancery to try a particular custom, which is merely for the information of the Chancellor, and which may be indorsed specially on the *postea* according to the truth of the fact. He was then stopped by the court, and

Buller J. said it was too clear for any further argument. The authorities cited are directly in point as far as they go. It appears from them that no consultation ought to be awarded: but it is equally clear that the verdict must be entered for the defendant.

[1804] In order to try a particular *modus* one party alleges, and the other denies the existence of it; that is the only issue on the record to be tried. As the plaintiff therefore has failed in proving the *modus* as alleged in pleading, the verdict must be entered specially for the defendant, who is entitled to his costs. But, though the *modus* be not found as laid, yet, if any *modus* be found, that is a sufficient ground for refusing a consultation.

Per Curiam. — The verdict must be entered specially for the defendant; and no consultation will be awarded.

H. 27 Geo. III. A.D. 1787. B.R.

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Darby v. Cosens, Clerk.

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Notley v. The same. [1 Term. Rep. 552.]

THE defendant, who was vicar of *Long Burton* in the county of *Dorset*, in the year 1784 libelled both these plaintiffs in the ecclesiastical court of the dean of the cathedral church of *Sarum* for tithes. The plaintiff *Darby* pleaded the following *modus*, or prescriptive or customary payments, which he stated to have been paid immemorially, namely, 2s. 10d. for the farm and lands, called *Whitehouse Farm*, and 6s. for a farm and lands, called *Hutchins*, (being the same estate for the tithes of which the plaintiff was libelled), in lieu of all vicarial tithes, and tithable matters within and upon the said farms, payable at *Lady-day* yearly. On the 2d of *July* 1785, there was an interlocutory decree in the decanal consistorial court of *Sarum*, that the answer of the present plaintiff to the third and fifth articles of the libel, which were for agistment tithes, and the tithes of the produce of a garden and orchard, was not sufficiently full, and that the plaintiff should make a fuller answer to those articles. From this he appealed to the Arches court of *Canterbury*, when Dr. *Calvert*, official principal of the said court, on the 11th of *July* 1786, pronounced the present plaintiff's answer to the third and fifth articles of the libel not to be sufficiently full and explicit: remitted the cause to the court below; and condemned the plaintiff in the costs of the appeal.

Where a *modus* is pleaded in an ecclesiastical court, a prohibition may be granted at any time before final sentence. A prohibition will be granted to a court of appeal, where it appears that they have no jurisdiction over the subject matter, even after they have remitted the suit to the court below, and have a - ed costs against the appellant, and though the party applying for a prohibition appealed to that court. [1305]

The plaintiff *Notley* pleaded a similar *modus* in lieu of the vicarial tithes for his lands: and, upon a decree in the Dean's court, that his answer was insufficient, he likewise appealed to the court of Arches, where his appeal was dismissed in the same manner as that of the plaintiff (*Darby*), and he was also condemned to pay the costs of the appeal.

In last *Michaelmas* term the plaintiff *Darby* obtained a rule to shew cause why a writ of prohibition should not issue to prohibit the court christian of the dean of the cathedral church of *Sarum*, from further holding plea of the matter there depending between the parties.

The plaintiff *Notley* obtained a similar rule for a prohibition to the court of Arches.

The court desiring that both these rules should be heard together;

Piggott and *Laurence* now shewed cause. — Where an inferior court has original cognizance of a cause, it has been decided in many cases that, if a party applies for a prohibition after sentence, he comes too late. *Argyle v. Hunt*, 1 Str. 187. In the present case, the libel being for tithes, the Dean's court had original jurisdiction

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Supra 200.

of the suit. And though, after pleading the *modus*, the plaintiff might have applied for a prohibition, yet by making no objection to the jurisdiction of the court till after the interlocutory decree, and thereby putting the defendant to a great and unnecessary expence, he has precluded himself from applying for a prohibition now. In the case of *Pull* against *Hutchins, Corp.* 422, the true distinction is taken by Lord *Mansfield* between those cases where the court will or will not grant a prohibition; and it was there held, that after a party has lain by and suffered the ecclesiastical court to proceed to sentence, a prohibition ought not to be granted, if the court below had original jurisdiction of the cause. Here it does not appear that the Dean's court determined upon the *modus*: they only decreed that the answer was not sufficient; from whence it is fairly to be inferred that the only question before them was respecting the form of the proceeding, of which they were the sole judges. As the court of Arches decided that the decree of the Dean's court was just, it being a question properly brought before them, this court will give credit to them for having rightly determined that point, without inquiring into the reasons on which that sentence was founded. And it is to be observed that the court of Arches likewise decreed the plaintiff's answer to be insufficient, which shews that they also considered it as a question of form.

[1306] As to the prohibition to the court of Arches, this application is also too late. That court, after confirming the sentence below, condemned the party in costs, and remitted the cause to the Dean's court: so that the suit is no longer in that court, except as to the costs: and a prohibition cannot now be granted to deprive the defendant of those costs, which were awarded to him by a court having a competent jurisdiction. Besides, it is the sole province of that court to adjudge costs against a party unjustly appealing, provided the appeal be properly brought before them; and the plaintiff is precluded from objecting to the competency of that court, he having himself appealed to it. But even supposing that the court of Arches were wrong in their judgement, and that they ought not to have awarded costs to the defendant, a court of common law cannot revise their decision upon that point, because the party might have appealed to the court of Delegates. And where a party has a remedy by appeal, no prohibition lies. 2 *Rol. Abr.* 319. n. 1.

Douglas in support of the rules was stopped by the court.

Ashurst J. — In my opinion this court even in this stage of the business must grant a prohibition to both the courts.

It is very clear that an ecclesiastical court cannot proceed in any cause where they have not an original jurisdiction of the subject matter; and if they do, a prohibition goes of course; or where

any incidental matter intervenes by which they are ousted of their original jurisdiction, in that case also a prohibition must go. Now I take that to be the case here; for though there is no doubt but that the ecclesiastical court have an original jurisdiction over matters of tithes, yet the instant the *modus* was pleaded, their jurisdiction was at an end.

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It has been said that this is only an interlocutory decree as to the insufficiency of the plea in point of form. If the sentence had proceeded on the ground of a mere matter of form, I do not say what the court would do: but here it does not appear that this is a mere matter of form; for they judge the answer to be insufficient generally as to two of the articles. And therefore we must exercise our own judgement, and examine whether on the face of the proceedings the plea appears to be insufficient. Now it does not appear to me to be insufficient; for the plea states that the *modus* is in lieu of the vicarial tithes; and that is an answer to the whole charge contained in the libel. If the court below could by an interlocutory decree adjudge the answer to be insufficient generally without assigning any reason for their opinion, it would preclude this court from granting a prohibition in any case. But this court will not suffer their hands to be tied up by such means.

With regard to the prohibition to the court of Arches; although the plaintiff might have made his application to this court sooner, I do not see why we should not, even now, grant the prohibition. Costs are merely incidental to the original matter; and if we put [1307] a stop to the original suit, we must do so to all the subsequent proceedings; and matter sufficient appearing for this court to interfere and oust the ecclesiastical court of their jurisdiction, I am of opinion that a prohibition should go to both the courts.

Buller, J. — Before a party is entitled to a prohibition, it is incumbent on him to suggest what has been done in the court below. When that suggestion is entered on record, if it state facts which are not true, the other party should move to quash it; but, if they be not impeached, the court must take them to be true. Now this case stands thus: to a suit instituted in the ecclesiastical court the party pleaded a *modus* which covered the whole farm; he has pleaded it in terms that can admit of no doubt. And the only remaining question must be as to the existence in fact of the *modus* pleaded; and that it was so pleaded below is not contradicted. Then if we judge on these proceedings, they will not support the arguments used by the counsel against the rules, that both the courts below held this plea to be bad in point of form; it is not sufficient for them to say so, but they should have shewn in what respect it was defective in form. It is not stated for what reason the

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courts below held the plea to be insufficient; and as the plea is stated on the suggestion, it is right in point of form. Then it appears to us that a *modus* was properly pleaded to the whole libel, which ousts the ecclesiastical court of their jurisdiction; and that is the ground on which this court will grant a prohibition. It is not necessary for the party to apply in the first instance for a prohibition; if he make an application any time before sentence, he is in time: no other line can be drawn. The argument which the counsel against the rule have used, namely, that the only object of this application is to prevent the defendant from recovering the costs to which he is entitled under the sentence of the court of Arches, is no objection to our granting the writ: that argument was much relied on in the case of *Whitford* against *Wilson*, in this court, *E. 25 G. 3.* where the parties had gone to a great length in the ecclesiastical court, before they applied to this court for a prohibition; but the court there said, if the party came before sentence, it was in time. As to the case cited from *Rolle's Abridgement*, in which it is said that no prohibition lies, if there be a remedy by way of appeal, it relates only to those cases where the suit below was proper; therefore it is not applicable here, for this is a case where, though the ecclesiastical court had originally jurisdiction, yet when the *modus* was pleaded, they were ousted of their jurisdiction. The prohibition is merely for the purpose of trying the *modus*; for the party applying must declare in prohibition, and if the jury find against the *modus*, I take it, a consultation goes of course. And then the ecclesiastical court will perhaps be justified in considering the costs in all the stages of the proceeding.

With respect to the other rule for a prohibition to the court of Arches, the suggestion states that the proceedings are now depending in that court; for though a sentence has been given, yet the costs have not been paid, and they are now proceeding to compel payment of the costs. Then they are in fact proceeding in this suit. And therefore a prohibition must go to both the courts.

Both rules absolute; and the court ordered the plaintiffs to declare in prohibition.(a)

H. 27 Geo. III. A.D. 1787. Scac.

Cowley v. Keys. [Mr. Cox's MSS.]

S. C.
4 Wood's
Decr. 327.
Lands formerly be-

THE plaintiff, as rector of the parish of *Goldhanger* with the chapel of *Little Toltham* in the county of *Essex*, filed his bill for the tithes of a farm called *Longwick*, otherwise *Longwyke*, situated in

(a) See also *Gare v. Gapper* and *Gould v. Gapper*, 3 East 472. 5 East 354. *infra*. *Stainbank v. Bradshaw*, 10 East 349. *French v. Trask*, 10 East 348.

the said parish of *Goldhanger*, praying the usual accounts. [N. B. The bill claimed a tithe of wild-fowl taken in a decoy, but this claim was abandoned at the hearing.]

The defendant, being the *owner* and *occupier* of the said farm, by his answer insisted upon the following exemption: " That the said farm called *Longwyke*, was heretofore part or parcel of the possessions of a certain abbey or monastery of *St. Mary* in *Coggleshall* in the county of *Essex*, which abbey or monastery was of the *Cister-tian* order and founded by king *Stephen* and his consort queen *Matilda* in 1142, and afterwards surrendered or dissolved in the 29th year of the reign of king *H. 8.*; that the said abbey and the farm and lands thereunto belonging had been and were previously to, and at the time of, the surrender or dissolution thereof in the manurance and occupation of the abbot and convent of the said abbey or monastery, and that the same were exempt and discharged from the payment of tithes of the said lands by reason of the said order, and, especially, of the said lands so holden in the manurance and occupation of the said abbot and convent: that by a surrender bearing date the 5th day of *February* in the 29th year of the reign of *H. 8.* the abbot and convent of the said abbey of *Coggleshall* (being one of the greater abbies and of the yearly value of 251*l.* 2*s.*) surrendered all the estates and possessions (including the farm and lands before mentioned) belonging to the said abbey to the crown, which surrender was afterwards (among divers others) confirmed by the act of parliament made and passed in the 31st year of the reign of *H. 8.* for the dissolution of monasteries and abbies: that the lands so *occupied* and *manured* by him (the defendant) were at the time of the surrender thereof to the crown acquitted and discharged and free from the payment of any tithes whatsoever: that by letters patent bearing date the 17th day of *July* in the 35th year of the reign of *H. 8.* the king granted (among other things) All that his manor or grange of *Tolleshunt Major* and *Longwyke* in the county of *Essex*, with the rights, members, and appurtenances lately to the monastery of *Coggleshall* belonging, to *Stephen Beckingham* and *Anne* his wife, To hold to them the said *Stephen Beckingham* and *Anne* his wife, their heirs and assigns for ever: that by virtue of several mesne conveyances the defendant derived a title to the said farm and lands which were then in his manurance and occupation under and from the said grant to *S. Beckingham* and *Anne* his wife, and by virtue thereof the defendant was then seised of the said farm and lands, and was the absolute owner thereof, he having purchased the same for a valuable consideration some time in the month of *April* 1783; that he took the said farm and lands into his own manurance at *Michaelmas* 1783, and that he had ever since been in the occupation and manurance thereof for his own use, and there-

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longing to a *Cister-tian* abbey are discharged of tithes whilst in the manurance of the owner, though such lands were in lease at the time of the dissolution of the abbey.

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[1812]

retain, and enjoy," being express words of possession, and properly applicable to that only. It is true, that in respect of a real discharge, that is, such as is inherent in the lands, it does not signify whether the lands were in the hands of the abbey or of the farmer: the possession of the tenant in that case was the possession of the abbey, the inheritance still remaining in the abbey. This would be so in a discharge by prescription; and that being a discharge inherent in the lands must remain with the lands; and to such a case the words of the act will apply. But it is otherwise where the exemption is personal; the clause of the statute will not extend in the same manner to personal privileges. All that the abbey had at the time of the dissolution was a personal capacity to take back these lands on their return exempt as before the lease. But there was no existing discharge at the time, only a capacity of reviving such discharge in future. It is true, if the lands had happened to be in the manurance of the abbey at the time, the king would have had the benefit of the existing exemption: but they being in other hands, and the personal privilege being thereby suspended, How can it be within the words of the statute? That which did not exist could not be continued. Nothing is said about the revivor of any privilege, but merely the continuance of an existing one. Nor does the act say, the king shall hold in as large a manner as the abbey *might have holden*, but merely as they *did hold*. And as they most certainly did not then hold discharged of tithes, there was no exemption to be protected by the statute. The only authority on the other side is the case of *Porter v. Bathurst*, *Cro. Jac.* 554. 559.; but the case of *Lord v. Turk*, in *Bunb.* is at least of equal authority. And in *Hob.* 296. the words of the pleadings are *quamdiu in propriis manibus excoluntur*, which, being a case of pleading in prohibition, is of considerable authority.

Supra 373.

Supra 385.

The counsel for the defendant perceiving the opinion of the court to be with them on the present point, did not argue it much, but observed that the case in *Cro. Jac.* which was also in *Palm.* 118. appeared to be a case of considerable weight and authority. And *Selwyn* added, that in the case of *Bennison v. Smith*, 11 *Geo.* 3. in the Exchequer(a), *Parker C.B.* said he had seen Baron *Price's* MS. notes of *Lord v. Turk*, by which that case appeared to be much misreported by *Bunbury*.

Lord C. B. *Eyre*. — If the court were inclined to determine the present question in favour of the rector, the case should stand over, that we might have an opportunity of giving it more consideration. But as we think at present on this point with the defendant, we see no reason to postpone directing the issue, which we think necessary to be tried on the other part of the case. If that issue shall

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[1313]

[1314]

be found for the defendant, then the rector will have another opportunity of discussing this point; so that he is not absolutely concluded by our present opinion. The case in *Cro. Jac.* is a case of great authority, determined on a special verdict in prohibition, and I greatly prefer such a determination in prohibition to any decision in a court of Equity in a collateral way. The question in the former mode is pointedly on the record: there is an opportunity of appealing; and the ground of the decision is distinct, and not to be misunderstood. But, if there had been no such case to be found, we should have been of the same opinion, seeing what has been the current of determinations on other branches of the statute: we have nothing to do with the policy of the law: we must take it as we find it: our business is only to expound the law. With regard to the observation which has been made on the words of the act, "have, hold, occupy, possess, use, retain, and enjoy," I do not see that these words can be restrained so as to pass only a possessory right; and if they did, they must have the same effect in the case of real exemptions, which is admitted by the counsel to be otherwise. Indeed "have and hold," are words constantly made use of to convey the largest estates, and do not apply merely to manurance. That being the true construction, the only argument of weight seems to be, that this species of privilege was not only personal, but one that could not be said to be *in esse* at the time of the dissolution; and if not *in esse*, it could not be continued, and therefore was not a subject of the provision of the statute. But I cannot doubt of the existence of this privilege at the time of the dissolution, not indeed in point of benefit, but in point of right. It is admitted that the privilege is not destroyed by the lands going out of the hands of the abbey, for it returns to them with the lands. It is only suspended in point of benefit, but is never gone out of them in point of right. The case in *Cro. Jac.* seems to me to be quite right, and the case of *Lord v. Turk* (a) in *Bunb.* to have been determined without due consideration, and I therefore cannot lay any stress upon it against the obvious interpretation of the statute. However, without giving an absolute opinion against the rector at present, we must direct the issue to try whether these lands were or were not part of the possessions of the abbey at time of the sur-

(a) The case of *Lord v. Turk*, as reported by Mr. *Bunbury*, is as follows: Bill by the vicar of *Tischurst* in the county of *Sussex* for tithes. The defendant insists that the lands were parcel of the monastery of *Robertsbridge*, which was of the *Cistercian* order, and therefore discharged, being dissolved by the statute of 31 H. 8. as one of the greater abbeys. But *nota*, lands, though of the *Cistercian* order, were not discharged, but *quandiu in propriis manibus*; and even not all those, but only such as were in them before the council

of *Lateran*, as is expressed in that council which was holden 5 H. 2. anno 1179. The method of proving whether the lands were purchased before or since the council of *Lateran*, is only by payment of tithes, which will induce a presumption that they were purchased after. And, *per curiam*, the defendant was decreed to account; for that it appeared that the lands were in tenant's hands, and, consequently, not discharged when they came to H. 8. (p. 122.)

1787.

Cowley
v.
Kaye.

render; and on further directions this point, if necessary, may be again discussed.

Hotham B. and *Perryn B.* concurred.

P. 27 Geo. III. A.D. 1787. Scac.

Bramston v. Heron and others. [MS.]

S. C.
4 Wood's
Decr. 330.
It is no defence to a demand for tithes of a house in London that it stands on the site of old houses which never did pay any tithes. A payment for eight years does not constitute a customary payment within the meaning of the statute and decree of 37 H. 8.

THIS was a bill by the lessee of the rectory of *St. Botolph Aldersgate, London*, under the dean and chapter of *Westminster* against the defendants, occupiers of houses within the parish for tithes according to the statute and decree of 37 H. 8. that is, for every 10s. rent 16½d.; for every 20s. rent 2s. 9d.; and so above 20s. rent by the year from 10l. to 10s. according to the rate aforesaid. The defendants set up different payments and exemptions. *Heron* insisted that he was not liable to pay any tithe, 1st, because he said the plaintiff's title was on the custom only, and not on the decree, which never had been followed: 2dly, because he occupied a new-built house, one of five houses built on a spot where old houses and warehouses stood, which never did pay any tithes. He insisted also upon the want of jurisdiction in the court, the power of determining all controversies respecting the payment of tithes being reserved by the act to the mayor. *Fleet*, another of the defendants, stated that he occupied a new-built house, and that no tithe is due because built on ground where old shops stood. *Underwood*, another defendant, stated a payment of 10s. a year, his house being a new house built on the site of five old houses. The other defendants stated most of them several ancient payments: and those who stated such payments, offered by their answers to make them. The plaintiff, shortly after the answers had come in, amended his bill, and offered to take in some instances the sums stated by some of the defendants, but varying the sums with respect to others of them: as to all the other defendants, however, he prayed that they might be decreed to pay according to the stat. and decree of H. 8.

[1315] Lord C. B. — The plaintiff has a *prima facie* title; the burthen of proof is on the defendants. As to *Heron*, he has said that there is no title under the decree, and if he had proved a customary payment generally through the parish, to be sure he would have made out his assertion; but he has not done so. He has next said that his house is a new house built on the site of two old houses and buildings which have never paid any tithes; and his proof of this has gone back for thirty years last past: and if that could be shaped into a defence on the general non-payment, he must succeed.

But it was properly urged, that admitting it to be true, that it was built on the site of two old houses, this would be no defence,

unless it had been shewn that a less rate had been paid; for an exemption will not do. This is a mansion-house rent. The first part of the decree makes it general: and it is a rational mode of tithing. That all houses were intended is evident from the clause which directs that dwelling-houses converted into warehouses, &c., and warehouses, &c., converted into dwelling-houses, shall still pay as mansion-houses; and also from the exemption in favour of noblemen's houses, and the halls of companies. As to the clause in exemption of detached sheds, &c., this is not an exemption in favour of the land: for buildings, not the land, are the subject of the act; and we think the privilege not extended to the building, when altered to another thing. *Heron* therefore cannot defend himself by non-payment for thirty years: but the decree must be against him without costs. As to all the other defendants except *Underwood* and *Fleet*, the decree must be against them for the sums claimed by the plaintiff with costs. As to *Underwood*, he insists upon an old rate, because he occupies a new house built on the site of five old ones: and if new, I should have held it applicable to general payments, not particular ones. But I am of opinion that the fact is here not made out, the payment being only for twelve years, and a very large one too. Nor can I agree that eight years constitutes a customary payment within the true meaning of the act, for the only clause which mentions eight years is that which respects the conversion of houses into shops, &c. There must be a decree therefore against him, and that with costs. And the same against *Fleet*. (a)

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Bramston
v.
Heron.

P. 27 Geo. III. A. D. 1787. In Canc.

[1816]

Bishop v. Chichester. [Mr. Cox's MSS.]

THIS was a bill by *John Bishop* D.D. and *Thomas Horner* esq. against the several defendants, who were occupiers of lands in the chapelry of *Stokeland* annexed to the parish of *Doulting* in the county of *Somerset*, stating, that in Dec. 1782, the plaintiff *Bishop* was instituted and inducted into the vicarage of the parish of *Doulting*, with the said chapelry of *Stokeland* annexed, and was entitled by endowment, prescription, or ancient usage, to the several small tithes therein mentioned; and also stating, that the plaintiff *Horner* being seized in fee of the rectory impropriate of the said parish and of the great tithes, by indentures of 4 and 5 Dec. 1784, conveyed to the plaintiff *Bishop* and his heirs the said rectory impropriate and all the said tithes which had become payable to the

S. C.
2 Bro.
Equ. Ca.
161.
The marginal abstracts are attached to their respective subjects.

(a) See also *Williamson v. Gosling*, *supra* 902. *East India Company*, cited 13 Ves. 12., 4 Pri. 84. n. *infra*. *The Warden, &c. of St. Paul's v. India Company*, 13 Ves. 9. *infra*. *Kynaston v. The Dean*, 4 Pri. 85. *infra*.

1787.

Bishop
v.
Chichester.

plaintiff *Horner*, since the induction of the plaintiff *Bishop*, and that by virtue thereof the plaintiff *Bishop* became entitled to all the great tithes of the said chapelry of *Stokeland*, and particularly to the tithes of corn, grain, and hay: that the several defendants occupied lands within the said parish, and had tithable matters thereon in the years 1783 and 1784, for which tithes were due as aforesaid, but that the defendants set up some *moduses* or ancient customary payments as payable in lieu of such tithes; particularly a payment of 4*d.* for every acre of ancient pasture land within the said chapelry, which, they pretend, extends over all the new-inclosed lands within the said chapelry, which were formerly open waste lands, part of the forest of *Mendip* in the said county, and were inclosed by virtue of an act of parliament made in the 15th year of *Geo. 3.* whereas the plaintiff insisted, that tithes in kind were payable, and that no such *moduses* or customary payments existed; and that if any compositions had been theretofore paid in lieu of such tithes, the same were merely temporary compositions, and the plaintiff *Bishop* was not bound thereby; and that if any such *modus* of 4*d. per acre* had been payable for the ancient pasture land within the said chapelry, yet the same would not extend to the newly-inclosed lands, part of which had been since ploughed up and sown with corn. The bill therefore prayed an account against the several defendants of the tithes of corn, grain, hay, grass, and clover, of agistment-tithe, of the tithes of mares, cows, ewes, and other sheep and lambs, [1317] sows and poultry, colts and calves, eggs and young poultry, milk, wool, fruit, plants, herbs, garden-stuff, &c.

The defendants by their answer insisted, that there were, and for time whereof the memory of man was not to the contrary had been, within the said chapelry and the tithable places thereof, certain customs or manners of tithing; that is to say,

1st, That every occupier of lands or tenements within the said chapelry, and the tithable places thereof, who hath kept and depastured any sheep within the said chapelry or the tithable places thereof in any year, hath paid and for all the time aforesaid hath been accustomed to pay, and of right ought to pay to the vicar of the said parish of *Doultong*, with the said chapelry annexed for the time being, 1*d.* in every such year for every such sheep, which hath been shorn within the said chapelry in such year, in lieu, full satisfaction, and discharge of the tithe of wool shorn from such sheep, and of the tithe of agistment of such sheep in such year.

2d, For every milch cow 3*d.* and for every milch heifer 2*d.* in lieu of the tithe of milk.

3d, That every such occupier as aforesaid, who hath had any lamb dropped alive within the said chapelry, or the tithable places thereof in any year, hath paid, and during the time aforesaid hath

been accustomed to pay, and of right ought to pay to the vicar of the said parish and chapelry for the time being, 3*d.* for every such lamb, in lieu, full satisfaction, and discharge of the tithe of such lamb, and of the tithe-wool shorn from such lamb in the same year.

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Chichester.*

4th, For every colt 12*d.*

5th, For every horse, mare, or gelding, kept and depastured within the said chapelry or the tithable places thereof, and not employed as a market-horse or otherwise in husbandry business within the said parish, 6*d.* in lieu of the tithe of agistment of such horse, mare, or gelding, in the said year.

6th, For every fat beast, bullock, or heifer, 12*d.*; and for every lean beast, bullock, or heifer, 6*d.*

7th, That every such occupier as aforesaid who hath had in any year any calf or calves under the number of seven dropped alive within the said chapelry or the tithable places thereof, hath paid, and for all the time aforesaid hath been used and accustomed to pay, and of right ought to pay one halfpenny for every such calf so under the number of seven calves reared, and 6*d.* for every such calf, if killed or sold or sent out of the said chapelry, in lieu, full satisfaction, and discharge of the tithes of such calves: but, if such occupier as aforesaid in any such year hath had any calves to the full number of seven, or any number more than seven and less [1318] than fourteen, dropped alive within the said chapelry or the tithable places thereof, then such occupier hath paid and rendered, and for all the time aforesaid hath been accustomed, and of right ought to pay and render to the vicar of the said parish of *Doultling* with the said chapelry annexed, one of such calves in such year, in lieu of the tithe of all such calves; and if fourteen, and less than twenty-one, then two calves; and if any such occupier hath had any greater number of calves in any year, then such occupier hath paid, and for all the time aforesaid hath been accustomed and of right ought to pay to the vicar of the said parish of *Doultling* with the said chapelry annexed the tithes of such calves in like manner, that is to say, three calves out of twenty-one or any greater number under twenty-eight, and so on according to the number of calves which such occupier hath had in each year.

8th, For ewes lambing within the said chapelry and then sent out before shearing time, 3*d.* for every lamb, in lieu of the tithes of lamb and agistment of such ewe and lamb.

9th, For other sheep agisted 1*d.*

And the several customary payments aforesaid are paid and payable, and for time whereof the memory is not to the contrary have been paid, and of right ought to be paid to the vicar aforesaid on the 12th day of *August*, commonly called *Lammas-day*, old style, in every year.

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10th, For the tithes of every garden 1*d*.

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11th, Two-pence for every person in every family above the age of sixteen for *Easter* offerings.

The defendants then say, that there are and for time whereof the memory of man is not to the contrary there have been, within the said chapelry and the tithable places thereof, certain other customs or manners of tithing; that is to say,

12th, That every occupier of lands and tēnements within the said chapelry or the tithable places thereof, who hath had any ground within the said chapelry mowed for hay in any year hath paid, and for all the time aforesaid hath been accustomed and of right ought to pay to the vicar aforesaid 4*d*. for every acre of such land so mowed for hay in such year, and in the same proportion for every quantity of such land less than an acre, in lieu of the tithes of such hay.

13th, For every acre of corn or grain 2*s*. 6*d*.

These last payments to be made at *Old Michaelmas-day*.

[1819]

The defendants by their answer then said, that in case the court should be of opinion that the said several customary payments in lieu of the tithes of corn, grain, and hay, were not valid as perpetual compositions in lieu of such tithes, and that the same were temporary compositions only; yet they submitted, that as they had for many years previous to the 5th of *October* 1784 paid to the plaintiff *Horner* or his agents such compositions in lieu of such tithes, and no notice was given to the defendants or any of them previous to the 5th of *October* 1784 of any intention of the said plaintiffs to determine such compositions, the plaintiffs were in all events bound to accept such compositions for the years 1783 and 1784, which the defendants were always ready and willing to pay.

They then insisted, that the said customary payments were parochial payments, and extended to the newly-inclosed lands.

A great body of evidence was produced in this cause upon the existence of these several *modus*es, but the argument did not turn upon any part of it, except what related to the *modus* for the tithe of calves; and as to that, the defendants proved their *modus* as laid in the answer as far as respected the 12*d*. for every calf under seven; but the witnesses proved, that where there were more than seven and under fourteen, 7*s*. 6*d*. had been paid; where fourteen and under twenty-one, 15*s*.; where twenty-one and under twenty-eight, 1*l*. 2*s*. 6*d*.; and so on; and not one, two, and three calves, as laid by the answer.

The material part of the evidence on the part of the plaintiff respected the notice given by the plaintiff *Bishop*, that he meant to determine the compositions, and was to this effect; that on 28th of *July* 1783 the plaintiff *Bishop* went to the chapelry of *Stokeland*

for the purpose of receiving from the several occupiers of lands within the said chapelry payment for their great and rectorial tithes due to the plaintiff *Horner*, at which time all the defendants, except two, and several other occupiers of lands within the said chapelry were present; that the plaintiff *Bishop*, after having received the composition for the said great or rectorial tithes, gave notice to the several persons then present, that the composition which they had then paid for their said great or rectorial tithes would be no longer received by the impropriator thereof, but that the same was to cease *from that time*: that the plaintiff *Bishop* then proposed to the defendants another composition, which they refused to accede to; whereupon the plaintiff then gave notice to the defendants and other persons then present, that they were from that time to set forth their said great or rectorial tithes, in order that the same might be taken in kind.

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[1320]

This cause came on to be heard before the Lord Chancellor; *Mansfield* and *Graham* for the plaintiffs; *Scott* and *Mitford* for the defendants.

With regard to the 1st, 2d, 4th, 5th, 8th, 9th, 10th, and 11th, *moduses*, it was agreed that there was evidence in the cause sufficient to induce the court to direct issues upon them, and that there seemed to be no legal objection to them.

As to the 3d *modus*, that is, 3d. for every lamb, it was said for the plaintiff, that this was most clearly a rank *modus*, as it amounted to 2s. 6d. for each lamb's value, which was a price infinitely beyond what it was possible to conceive a lamb to be worth at the extremity of legal memory. This very point is determined in * *Layfield v. Delap*, 3 *Burn's Eccl. Law*, 412. and is evident by the remarks made by *Blackstone* on the value of the corn rents, 2 *Bl. Comm.* 322; which is a strong proof of the decreased value of money. Now if this were so in the time of *Eliz.* when these corn-rents were established; *a fortiori* must it be so in the time of *Richard* the first.

A *modus* of 3d. for a lamb is so notoriously rank, that a court of equity will not direct an issue upon it.
* *Supra* 560.

On the part of the defendants it was observed, that this *modus* extended to the tithe of lamb and wool of lamb; whereas in the case cited the *modus* covered the lamb only: but that in all events the rankness of a *modus* was a matter of fact, and not of law: and therefore to be sent to a jury; which was positively decided in the case of *Giffard v. Webb*, 4 *Br. P.C.* 212.

Supra 708.

On this point the Lord Chancellor said that the rankness of a *modus* depended upon the history of money, and certainly was in itself a question of fact and not of law: but that although it were a question of fact, it was a question which the court had frequently decided: that this *modus* was notoriously rank; and if so, there

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A *modus* of 12*d.* for a fat beast, and 6*d.* for a lean beast, is certain enough.

[1321]

A *modus* as laid was, that where there are more calves than 7 and under 14, one calf had been paid; where more than 14 and under 21, two calves; and where more than 21 and under 28, three calves had been paid: the evidence was, that instead of one, two, and three calves, 7*s.* 6*d.* 15*s.* and 11*s.* 9*d.* 6*d.* had been paid in those cases: held a fatal variance. A notice too late to determine a composition in one year will not serve for the succeeding year.

was no reason why a court of Equity should direct an issue to try a fact of which it was perfectly satisfied. (a)

On the 6th *modus* it was objected by the plaintiff, that there was an evident uncertainty, as it would be necessary to determine in every instance whether the beast was fat or lean, in order to settle whether 12*d.* or 6*d.* was to be paid. But the Lord Chancellor said, that this was a distinction perfectly well established among farmers; and he therefore saw no legal objection to this *modus*:

On the 7th *modus* it was said by the plaintiff, that the *modus* proved was essentially different from the *modus* laid in the answer, of which there was no proof whatever; that it was true, the court of Exchequer had formerly in some instances permitted the defendants to amend their answer and shape it according to their evidence; where it was fully proved that the parson was not entitled to tithes in kind; but that of late the court conceived it to be a dangerous practice, and had refused it.

To this it was answered by the defendants, that the *modus* was proved in part as laid in the answer, namely, to the extent of seven calves: that the difference in the other part of the *modus* was, that a sum of 7*s.* 6*d.* was payable instead of a calf: that this was evidently a sum of money paid as the value of the calf, and might be considered as evidence of a calf being payable; at least it was a matter to be left to a jury.

But the Lord Chancellor thought, that if the parson insisted upon it, he could not direct an issue upon this *modus*, as the evidence did not support it.

On the 12th and 13th payments, the argument turned on the sufficiency of the notice to determine them as compositions, in case they could not be established as *moduses*. And for the plaintiffs it was said, that it was to be considered, 1st, whether the notice given on the 28th of *July* 1783 was sufficient to determine the composition at the *Michaelmas* following; or, if not, whether it was not sufficient to determine it at the succeeding *Michaelmas* 1784 without any fresh notice: that it was formerly holden, that giving notice two days before the expiration of the year was sufficient to determine a composition, *Pryce v. Manning*, in *Cha.* 1750: that the idea of its being necessary to give a longer notice must be taken from the rule which is now established between landlord and tenant from year to year: but it does not appear, why the case of compositions should be subject to that rule; for it is to be supposed that the composition was the fair value of the tithe, and

(a) See *Layfield v. Enticknap*, *supra* 560. n.

it was therefore indifferent to the occupier whether he paid the tithe or the composition: that though it is to be considered as necessary to give six months notice to determine a composition, yet it did not follow that the notice given in *July 1783* was not sufficient to determine the composition at *Michaelmas 1784*; for that though it was true that as between landlord and tenant from year to year, a notice given in *July 1783* to quit at *Michaelmas 1783* would have no operation at all, inasmuch as it was too late for *Michaelmas 1783*, and would be of no avail after the tenant had commenced another year; yet the analogy did not hold in the present case: for the notice to quit was a notice confined to a specific time, and therefore was not taken to extend to any other but such particular period; and indeed in point of reason it was very easy to suppose a case where the landlord might wish a tenant to quit at one time, and yet, if that could not be, he might not have the same reasons the following year; and it was therefore settled that a fresh notice must be given: but the case of a composition for tithes is very different, for no time is specified, but it is a general declaration by the parson of his intention to take his tithes in kind. Indeed, this whole doctrine of notice was at first intended for farms only, for the encouragement of cultivation; and though for the sake of uniformity it was afterwards extended to houses, yet there seems no reason for carrying it farther. But in the next place, if the general rule should be otherwise, yet here the defendants cannot object to want of notice, as, by insisting upon these *moduses*, they have set up another defence perfectly inconsistent with that relation which makes notice necessary; and it is an established rule in the court of Exchequer, that where the occupier thinks fit to insist upon a payment as a *modus*, which is totally adverse to the parson's title, he shall not at the same time complain of want of notice to determine the payment as a composition, which is a perfectly distinct and inconsistent ground with the adverse claim which the occupier declares he stands upon, a ground where notice is not necessary.

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A defendant may object to want of sufficient notice to determine a composition, though he insist upon it also as a *modus*.

On the other side it was said, that the rule of notice to determine a composition stood exactly upon the same footing as the rule between landlord and tenant; and that this was solemnly determined in the case of *Hewit v. Adams* in the House of Lords: and as to the adverse title set up by the defendants, the very same circumstances occurred in that case, and yet the House of Lords were of opinion, that there not being sufficient notice, the parson's bill should be dismissed. As to the notice serving for *Michaelmas 1784*, though it was too late for *Michaelmas 1783*, that could be of no avail to the plaintiff in this case, since there is no proof of

Supra 1204.

1787. any tithes having accrued between *Michaelmas* 1784 and the time of filing the present bill.

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Chichester.

[1323]

The Lord Chancellor said, that he thought the rules of notice for determining compositions for tithes were exactly the same as those between landlord and tenant from year to year: that he always understood the reason, why a defendant who set up an adverse claim should not be allowed to object for want of notice, to be, that it was inconsistent for him to say in the same breath, that he does and that he does not hold from year to year; for the necessity of notice arises from that particular species of tenancy, which he disclaims by his other defence: and this principle would equally apply to the case of a composition from year to year; for the composition with the occupier is the same thing as a lease to a stranger; but that he could not distinguish this from the case of *Hewitt v. Adams*, which seemed to have decided the point the other way. (a)

A parochial
modus will
extend to
lands in-
closed with-
in time of
memory.
Supra 905.

The next point was, whether this *modus* for corn lands could extend to the lands newly inclosed. And for the plaintiff it was argued, that an immemorial payment could never cover the tithes of lands which for the first time produced corn within these fifteen years; and *Moncaster v. Watson*, 3 Burr. 1375. was cited as an authority for this.

Supra 823.

On the other side it was said, that the original agreement, which was to be presumed as the foundation of the customary payment, must be taken to include all corn land which should exist within the parish: that *Stockwell v. Terry*, 1 Ves. 115. was in point to this: that the distinction was between a parochial *modus* and a farm *modus*; a parochial *modus* was supposed to extend to all tithes of that particular species, which should arise within the district; whereas a farm *modus* depended upon more particular circumstances, and was more strictly confined: that in *Moncaster v. Watson*, it was a farm *modus*, and was payable in respect of some repairs to be done to the church, which therefore completely distinguished that case.

The Lord Chancellor was of opinion, that this being a parochial *modus*, might extend to the lands inclosed within time of memory.

A *modus* of
2s. 6d. an
acre for
corn lands
seems rank.

The *modus* of 2s. 6d. for the corn lands was also objected to as being rank; and so the Lord Chancellor inclined to think.

His lordship having given his opinion upon the several points as

(a) See also *Glass v. Caldwell*, supra 1030. *Tuck*, 1 Bos. & Pull. 458. infra 1517. *Fell v. Hume v. Wright*, supra 1217. 1221. *Adams v. Wilson*, 12 East 83. infra. *Bower v. Major*, *Waller*, supra 1204. *Atkins v. Lord Willoughby* 1 B. & B. 4. infra. *de Broke*, Anstr. 397. infra 1412. *Wyburd v.*

above-mentioned, the cause stood over by consent for a few days, that the parties might consider of the decree to be made. In the mean time they came to an agreement, that the defendants should wave the *moduses* for the lambs and the corn lands, and the plaintiff should accept the other *moduses* insisted on by the defendants.

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M. 29 Geo. III. A. D. 1788. Scac.

[1324]

Burslem v. Burbage. [MS.]

BILL for tithes. — The defendants pleaded as to part, and answered as to part; and by their plea they set forth that the tithes in question formerly belonged to the monastery of *Boardesley*, which was one of the greater monasteries dissolved *anno* 31 *H.* 8. and that by the act of parliament of that year all the possessions, &c. of the said monastery became vested in the crown: that *H.* 8. granted them away, and that by divers mesne grants, conveyances, and assurances, in the law, they became vested in defendant. Objection was taken by *Selwyn* to this plea because the several conveyances were not set out; but it was answered by *Burton*, *Richards*, and *Abbot*, that this was sufficiently certain even at law: that upon the evidence they would be bound to deduce a regular title; and of that opinion was the court, and allowed the plea.

Plea to bill for tithes. Title to the tithes derived from grant *H.* 8. and by divers mesne assignments vested in defendant, a good plea.

M. 29 Geo. III. July 15, A. D. 1789. Scac.

Hawes v. Swaine. [2 Cox's Ca. Equ. 179.]

THE Lord Chief Baron said, that although in order to establish a real composition for tithes, it was not now considered as absolutely necessary to produce the deed, yet evidence must be given of such a deed having existed; that where such evidence exists upon reputation, such reputation must be distinctly of payments having been made *under such a deed*; and that those payments had their origin under an instrument made within time of memory; otherwise it will be evidence of a prescriptive payment; that although the court had very properly relaxed in its practice, and did not now (as they formerly did) insist upon the production of the original instrument, yet they certainly expected, that in order to establish a real composition, the evidence should shew something that could distinguish it from a prescriptive payment. And to this point were cited **Robinson v. Appleton*, and †*Smith v. Goddard*.

S. C. 4 Wood's Decr. 318. In order to establish a real composition for tithes, the evidence must be such as to distinguish it clearly from a prescriptive payment.

* Supra 1101.
† Supra 1122.

1789.

M, 29 Geo. III. A. D. 1789. Scac.

Nash

v.

Thorn.

Nash v. Thorn. [MS.]

S. C.

2 Cos's Ca.

Equ. 199.

A farm mo-

dus laid for

all tithes

except

those of

corn and

grain, and

the tithes

due to the

vicar, is not

sufficiently

certain.

THESE were two bills filed by the rector of *Long Burton* with the chapelry of *Holnest*, against the defendant an occupier of lands in the parish, the one for the tithe of lambs, the other for hay and wool. To the first bill the defence was in substance as follows: "That 14s. 2d. had been immemorially paid by the occupier, &c. in lieu of all tithe except corn and grain, and except the tithe lawfully payable to the vicar for an estate and lands called *Taylor's*, part thereof being in defendant's occupation, for which he pays 10s., part in *A.*'s occupation, for which he pays 3s. 3d. and the remainder in *B.*'s occupation, for which he pays 11d., making together 14s. 2d." Similar *moduses* were stated as to six or seven other farms, and an allegation that no tithe in kind was ever paid, except as aforesaid. The defence to the other bill was to this effect: "That the defendant had paid no tithe, nor had any been yielded to any rector; therefore defendant believed the estate exempt and discharged immemorially, though he could not set forth by what means." The court decreed an account in both bills with costs; in the first, being of opinion that the *modus* was bad for want of distinguishing what tithes were covered by it; that is, that all tithes except corn and grain, and except the tithe due to the vicar was not sufficiently certain: in the 2d, because the defence was laid in a prescription in *non decimando*.

[1325]

H. 30 Geo. III. A. D. 1790. Scac.

Croft v. Ayer and Bailey. [MS.]

S. C.

4 Wood's

Decr. 361.

Where dif-

ferent mo-

ney pay-

ments in

lieu of

tithes are

set up for

distinct spe-

cies of land,

it is neces-

sary that

such lands

should be

clearly as-

certained,

otherwise

the court

cannot di-

rect issues

to try such

payments.

THIS was a bill by the rector of *Rowley* in *Yorkshire* for tithes: the defendants by their answer admit the plaintiff to be rector, and entitled to tithes in kind except in the township of *Risby*, which consists of 930 acres or thereabouts of inclosed land, whereof 1st, certain parts are demesne of the manor or lordship of *Risby*, and contain 156 acres or thereabouts; 2d, other parts are ancient inclosures, and contain 432 acres or thereabouts; and 3d, the remainder are 342 acres or thereabouts: they insist upon an immemorial custom that the owners and occupiers should pay the rector yearly at *Michaelmas* in lieu of all tithes, offerings, payments, dues, and duties, sum and things increasing, happening, &c. the several ancient payments or *moduses* following, viz. 1st, For the demesne lands 3l. 2s. For the ancient inclosures 1l. 10s. 3d. For all the land in *Risby* accustomed to pay tithe in kind 12l. which amounting together to 16l. 10s. have been immemorially paid after allowing the land-tax, amounting sometimes to 1l. and sometimes to

11. 4s. as a *modus* in lieu of all tithes, &c. within the said several lands: that the defendant *Ayer* occupies an ancient farm called *Town Farm*, viz. a messuage and 279 acres of land, being part of the said several lands covered by the said *moduses* some or one of them, and particularly part of the demesne part of the ancient inclosures, and part of such other lands, but difficult to distinguish how much and which of each, but she believes seventy acres of demesne and 110 acres of ancient inclosures: that defendant *Bailey* occupies an ancient farm called *Baileys*, viz. a messuage and 105 acres of land; that he is under the like difficulty of distinguishing how much of each species of lands, but believes forty acres of ancient demesne and fifty acres of ancient inclosures: they deny that tithe was ever due or paid in this township from time immemorial, &c. but they do not allege that the *modus* was ever paid or tendered by any one. The Chief Baron asked whether the defendants had by the answer ascertained the three different species of land; which being answered in the negative, he observed it was impossible to direct issues upon any of these *moduses*; though he wished to assist the defendants out of the difficulty of having tacked the third to the two others; if a decree was pronounced for an account only of the third description, when the rector came for his tithes, the occupier might say *no*, these are demesne, or old inclosures. All the court being clearly of the same opinion decreed an account of all the tithes demanded by the bill with costs, but without prejudice to any future claim to the benefit of the *moduses* defectively set forth in the answer.

1790.

Croft
v.
Ayer.

[1326]

H. 30 Geo. III. A. D. 1790. Scac.

Ellis v. Saul and others. [1 Anstr. Rep. 332.]

BILL by the plaintiff, vicar of *Sibsey* in the county of *Lincoln*, against the occupiers of land in the parish, for an account of the tithe of agistment of all horses, cows, oxen, sheep, lambs, and other cattle fed and depastured on lands within the parish of *Sibsey*, or the tithable places thereof, in their occupation respectively, or upon any commons or fens within or adjoining or near to the said parish. The plaintiff, without relying upon any particular endowment or other instruments, states, by way of title, that he is, by virtue of certain ancient endowments and otherwise, entitled to receive all or the greater part of the small tithes, &c. particularly the agistment tithe. To this bill the defendants, the occupiers, in their answer, set up three defences negating the vicar's claim to the tithe of agistment, or to any compensation in lieu thereof; first, they say that by an ancient custom, used within the said parish, from time whereof the memory of man is not to the contrary, there were and

S. C.

4 Wood's
Decr. 357.
The marginal abstracts are attached to the judgment.

1790.

Ellis
v.
Saul.

[1827]

are due and payable, and ought to be rendered and paid to and accepted by the rector of the said rectory, yearly and every year upon the 22d of *November*, commonly called *Old Martinmas-day*, three ancient *moduses* or customary payments, namely, an ancient *modus* or customary payment of 1*d.* *per* acre, in lieu of the tithes of all grass growing every year upon all the lands within a certain district or part of the said parish called *The Moors*, lying on the east side of *Wardike Drain*, whether such grass be mown for hay or be eaten by the mouths of barren and unprofitable cattle; and they set up another payment of 2*d.* *per* acre for another description of lands, in the same manner; and also an ancient *modus* or payment of 3*d.* *per* acre, in lieu of all the tithes of like grass, whether mown for hay or eaten by the mouths of barren and unprofitable cattle, growing yearly upon the grass lands within the said parish, and the tithable places thereof, not comprised within either of the above mentioned districts, (except the village or hamlet called the *Fryth Bank*, the tithes whereof are not due or payable either to the rector or vicar of the said parish of *Sibsey*, as the defendants apprehend, the same having been constantly paid to lord *Monson*, or his lessees, &c.); and they say that the said three districts comprise all the lands lying within the said parish of *Sibsey* except the *Fryth Bank* and the arable lands; that the plaintiff, as vicar or otherwise, is not entitled to the tithe of agistment of any sheep fed within the said parish, as claimed by the said bill, because they are not, nor hath there been, any barren and unprofitable sheep fed within the said parish during the time mentioned in the said bill, but on the contrary, all the sheep fed and depastured, as aforesaid, have in fact yielded, according to certain ancient and immemorial customs and usages within the said parish, tithe in kind of wool and lamb, or some *modus* in lieu thereof, to the rector of the said parish for the time being, in manner following, (i. e.) tithe, in kind, of wool, for sheep brought into the said parish before *Candlemas-day*, in any year and clipt therein; and an ancient payment of 1*d.* *per* head for every sheep brought into the said parish after *Candlemas-day* in any year, commonly called new sheep, and clipt therein, in lieu of the tithe of wool of such sheep; and also another ancient payment of 3*d.* *per* head for every sheep which shall have been in the said parish before the 13th of *February* commonly called *Old Candlemas-day*, in any year, whether bred or shorn in the said parish in the preceding year, or brought into the said parish a short time before the said 13th of *February*, in any year, and carried out of the said parish before the succeeding shearing day with the wool upon its back, as an average rate or payment in lieu of the tithe of wool carried out upon the backs of all sheep removed out of the said parish after any one shear day, and before the shear day in the succeeding

year; and therefore that the vicar is not entitled, &c.; but if the court should be of opinion that the plaintiff is entitled, then the defendants insist that he is not, to the extent claimed by his bill, because they submit that tithes of agistment of barren cattle fed on lands which have been mowed for hay, and have paid tithe of hay, or a *modus* in lieu thereof, in the same year, are not due, of common right, to the vicar: they insist that no tithe of agistment, or *modus* in lieu thereof, has ever been paid to the plaintiff, or any preceding vicar of the said parish, for barren cattle kept, fed, and depastured upon certain commons and fens called the *East* and *West Fen*; and they submit, that no tithe of agistment is of common right due or payable to the vicar aforesaid for barren and unprofitable cattle kept, fed, and depastured upon the said common or fen, the same, or any part thereof, as defendants believe, not lying within the said parish of *Sibsey*, or the tithable places thereof; that no *modus* or composition hath ever been paid to the vicar of the said parish for the time being, in lieu of the tithes of agistment of barren and unprofitable cattle fed on lands within the said parish, or the tithable places thereof.

1790.

Ellis
v.
Saul.

[1328]

The defendant *Gape*, the impropriate rector, (who was by the order of the court made a defendant), by his answer admitted the vicar's claim to all small tithes, &c. except such as were due and payable to the rector, and submitted to the court, whether the plaintiff was entitled to the tithe of agistment. He admitted to have received the several payments of 1*d.* 2*d.* and 3*d.* and also the sheep payment, and stated that, according to his information and belief, the same had been immemorially made, and were *moduses* in lieu of such tithes as in the answer of the other defendants were set forth.

It appeared that the tithes of this parish originally belonged to the prior of *Spalding* as impropriator.

The evidence on the part of the plaintiff, the vicar, consisted of an endowment dated in 1363, &c. and a terrier of 1707.

In the endowment, (which was taken from an ancient book of institutions in the time of bishop *Buckingham*, who began to preside over the see of *Lincoln* in 1363, which book is remaining in the registry of the see of *Lincoln* at *Lincoln*), which purported to be an endowment of the said vicarage, there is this clause: "*Percipiet insup. vicarius dicti loci qui pro tempore erit a religiosis prædictis annis singulis omnia quæ sequentur, viz. melioris frumenti, viginti quarteria hordei, vel consimilis, quatuor quarteria avenar & quatuor carricatus feni, sex carricatus straminis quæ omnia percipiet ad festa Omn. Stör & Item percipiet omnia mortuaria, &c. Item percipiet dictus vicarius decimas lactis & omnesq; minutas decimas exceptis decimis*"

1790.

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v.

Saul.

“*anserum, porcellorum, agnorum, & lanæ, quas decimas dictos reli-*
 “*giosos volumus, &c.*”

In the terrier (which was extracted from the registry of the lord bishop of *Lincoln*, and is entitled, “A true and perfect terrier of
 “all the glebe lands and dues belonging to the vicarage of *Sibsey*,
 “in the parts and county aforesaid, drawn according to the direc-
 “tions sent by the right reverend father in God *William* lord bishop
 “of *Lincoln*, October 8th 1707,” and signed by the vicar, church-
 warden, and six other persons), there is this clause: “*Item*, it is a
 “vicarage endowed, in lieu of tithe-corn, hay, wool, lamb, pig,
 “and geese, (as may, by the original endowment now in the re-
 “gistry at *Lincoln*, appear), with twenty seame of barley, thirteen
 “seame of wheat, four seame of oats, four loads of hay, and six
 “loads of straw, all which are paid unto the vicar upon *All Saints-*
 “*day* and *Good-Friday*, by equal portions; and upon *Saint Mar-*
 “*tin's-day*, for every milch cow 4*d.* for every calf 1*d.* for every fowl
 “1*d.* and for hemp, flax, cole, rape, chickens, ducks, turkies, and
 “all other small tithes, (excepting in the *Fryth Bank*, which pays
 “no manner of tithes to the vicar, the same being paid to *William*
 “*Monson* esq.) in kind.”

The plaintiff's counsel also read parol evidence, taken by cross examination of the defendants witnesses, to prove that the witnesses had not heard of any such thing as agistment-tithe till the present suit was instituted, and did not know the meaning of the word agistment; and also to prove, by one of the witnesses, that the one-penny, two-penny, and three-penny payments were for cut of grass, and that that part of the lands to which the two-penny payment was applicable was *Lammas* land, and that none had right of common there but persons resident in commonable houses, but that outners had rented this land and made the payment to the rector. They also proved that tithes had been paid for lambs dropt upon the *East* and *West Fen*, and for wool shorn from sheep depastured on those fens, to the rector.

The proof in the cause for the defendants, the occupiers, consisted entirely of parol evidence of the fact of the payments having been made to the rector in such manner and in lieu of such tithes as alleged in their answer, and that the same had been invariable, and, by the reputation of the parish, immemorial; they also proved the *East* and *West Fen* not to be within the parish of *Sibsey*, (although the parishioners had a right of common there), but they did not know within what parish the same were situate.

[1330]

Partridge and *Harvey*, for the plaintiff, stated the vicar's title to the agistment-tithe to be founded in the endowment, which, under the general words *omnes minutas decimas*, endowed him with the agistment-tithe; and that this title was the stronger and more in-

disputable, by reason of the exception contained in the instrument; that that exception was tantamount to express words; and that the same observation applied also to the terrier.

1790.

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v.
Saul.

With respect to the one-penny, two-penny, and three-penny payments, they contended that there was a general objection which went to the whole, namely, that the payments were to the wrong person, the rector, and not the vicar; 2dly, that the defence was not sufficiently technical, and did not apply to every species of agistment-tithe; for instance, there might be turnips or cole cultivated on some of those lands, and afterwards eat off by barren cattle, in respect of which agistment-tithe would be due, and the payments did not apply to this case.

They also argued, that part of the lands being *Lamm* lands, and sometimes occupied by outners who were not entitled to a right of common there, and therefore could not occupy the same during part of the year, it was unreasonable to suppose that such outners could pay the 2*d*. in lieu of the tithes alluded to in the answer.

As to the average payments for sheep, they insisted that such payments were inconsistent, as *modus*es, with the other *modus*es, for that there could not be a general *modus* extending to all barren cattle, and a particular *modus* applicable only to one species, namely, sheep; and therefore the payments were inconsistent and bad: they also insisted that the sheep payments did not meet the vicar's claim, as they are said to be in lieu of the tithe of wool and not of agistment; and in that respect also they were bad and absurd, as there is no tithe of wool due or payable till severance.

They abandoned the claim to agistment for after-pasture.

As to the agistment-tithe for the *East* and *West Fen*, they insisted that the plaintiff was entitled to it under the statute of 2 & 3 E. 6. c. 13. whereby it is enacted, "That all and every person which hath or shall have any beasts or other cattle tithable, going, feeding, or depasturing in any waste or common ground whereof the parish is not certainly known, shall pay their tithes for the increase of the said cattle so going in the said waste or common to the parson, &c. of the parish where the owner of the cattle dwelleth;" and they argued that tithe of agistment is the tithe of the animal and not of the land, and that appears from its being [1831] due only in respect of certain animals, namely, barren cattle; that the increase meant the improvement; that if tithe of agistment were due merely for the eatage of grass, such tithe would be due for animals *feræ naturæ*; that agistment-tithe, in *Burn*, is said to be the feeding of cattle upon pasture lands, which cattle pay no other tithes, and therefore the animal only is the thing considered: they cited **Sherrington v. Fleetwood*, Cro. Eliz. 475. and †*Saville* 60.

* *Supra*
189.
† *Supra*
156.

1790.

Ellis
v.
Saul.

Newnham, Burton, Topham, and Sutton, for the defendants, insisted; 1st, That the payments in lieu of the wool and agistment for sheep, were unimpeached by any legal objection; that in consequence of those payments, there were no sheep in the parish unproductive of tithe, or a compensation for tithe; and therefore no agistment-tithe could be due; which tithe is payable only in respect of barren cattle.

The objection to this particular *modus*, as being inconsistent with the general *modus* before set up, might easily be reconciled by an exception in the general *modus*; and this is no objection in point of law; the same was done in the case of *Bennet v. Read*. It must be admitted, that those payments do not apply to every case of sheep removed out of the parish, as there is the period of time between shear-day and the end of the year unprovided for; but the payments clearly proved, from the nature of them, that the parties to this contract had in contemplation the agistment of sheep; and the court would not require that the contract should provide for every possible case. But if it be a reasonable average payment, and proved to have been invariably and immemorially paid and received, it is sufficient. *Bennet v. Read* is in point also to this part of the argument.

They also argued, that sheep could not be liable to agistment-tithe in any case; for that they were useful by manuring, as cattle of the plough were by cultivating the land: and it is laid down by lord *Coke* that tithe-agistment is not due for cattle yielding profit or manure.

Eyre C. B. — That depends upon the fact. If a flock were kept for the mere purpose of folding upon the land, they might be exempt from tithe of agistment.

It was objected by the court, that the manner of laying the three-penny payment for sheep brought into the said parish a short time before the said 13th of *February*, was extremely vague and uncertain.

[1332] In answer to which it was said, that those words were superfluous and might be expunged.

They then argued, that if the average payments for sheep were bad, still there were the other *moduses*, which were sufficient to negative the parson's claim. Three objections had been made to these *moduses*: 1st, That the payments were to the wrong person, the rector, and not to the vicar. 2dly, That the defence was insufficient, in not using the technical word agistment, and not being sufficiently extensive to apply to cole or turnip. 3dly, The objection to part of the lands being *Lammas* lands, &c.

As to the first, they answered, that the payments were stated to be immemorial, and must therefore have originated in a contract with the rector, to whom all the tithes in the parish originally,

and before the endowment, of right belonged. To the second objection they answered, that there is no principle or case which establishes, that a set of formal words must be used to negative the parson's claim; but it is sufficient if a good legal compensation be insisted upon, and proved to have been immemorially made in lieu of the tithe claimed by the plaintiff's bill. And as to the objection, that this defence does not apply to the case of cole and turnip being cultivated and fed off, if that were a fact in this case, it might raise an argument, but there was no proof of any such tithable matter; nor did the objection affect the legality of the *modus*, but could only tend to limit and restrain the extent of it. It might be argued possibly, that these payments of 1*d.*, 2*d.*, and 3*d.* were only average payments for hay, taking the chance of the lands being cropped for hay or not: but this would be unreasonable, as in that case the defendants might be liable to a double tithe; namely, the payment of these *moduses*, and also for agistment-tithe of the same land in the same year. And further, these payments were at so much *per acre*, varying according to the quantity, and were proved by the whole evidence to have been made in lieu of the eatage as well as the hay.

1790.

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v.
Saul.

As to the words used in the endowment giving all the small tithes under the general terms *omnes minutas decimas*, first, there has been no possession under it; and therefore, like any other old instrument, where there has been no consistent possession, it is not evidence of title; and the presumption from the want of possession is, that the ordinary, who had always a power of abridging the endowment, might in this instance, by a subsequent instrument, have diminished or reduced it.

Eyre C. B. doubted whether there was any instance of an instrument to reduce or abridge the tithes granted by an endowment. [1333]

Burton admitted that it was no where laid down in terms, that a bishop or ordinary has authority to diminish, though he may extend or dissolve an endowment; but it may be done by amicable arbitration or judicial decision, as by the bishop or proper officer under him in a judicial proceeding, or by an instrument amicably adjusting and deciding the rights. There is a case of that sort between the nuns of *Langeley* and the vicar of *Sumeredby*. See *Maddocks's Formulary* 88.

They contended also, that if the *moduses* insisted upon had existed immemorially, the endowment in this case, which was merely an agreement between the rector and vicar, and to which the land-owners were not parties, could not affect their rights, and cited to this effect * *Fox v. Ayde*, 2 *P. Wms.* 520. † *Greene v. Austen*, *Yelv.* 86.

* *Supra*
697.

† *Supra*
226.

General words in any instrument, like ambiguous words, are

1790. capable of being expounded by custom and usage. 2 *Roll. Abr.* 335.
plac. 8. *Attorney General v. Parker*, 1 *Ves.* 43.

Ellis
v.
Saul.

As to the third question, whether the vicar is entitled to agistment of barren cattle depasturing upon the *East* and *West Fen*? they contended, that as those fens were not within the parish of *Sibsey*, the vicar's title must rest upon the statute of 2 & 3 *Ed.* 6. c. 13. and that neither the words nor the intent of the statute apply to agistment-tithe. The words are "all persons that have beasts or "other cattle tithable;" and it is a clear principle, that agistment-tithe is not due for cattle that are tithable, but for barren cattle. Agistment-tithe is, from the definition of it, the tithe of the land; for it is the tithe of the herbage eaten by the mouths of barren cattle; and it is not due for after-pasture, because the tithe of hay has been once paid, and the same land shall not in one year pay double tithe; but if it were the tithe of the cattle, that reason would not apply. That that is the reason why agistment is not payable for after-pasture, appears from *Greene v. Austen*, *Yelv.* 86. 2 *Inst.* 651-2.

Supra 550. 2 *Salk.* 655.

By the words of the statute, this tithe is payable for the increase of cattle, whereas the tithe of agistment is payable whether the cattle increase and improve, or become lean and impoverished; or if they die, it will be payable to the time of their death: so that the words of the statute do not apply or extend to the case of agistment-tithe.

2dly, The intent and object of this statute do not apply. This statute, from the preamble, appears to have been framed for the
 [1334] purpose of protecting the parson from the frauds that might be practised upon him, and the losses he was subject to from the difficulty in ascertaining the tithe due and payable to him. The tithes of the young are due where they are dropped, of milk and wool where they are taken from the animal; so that it was extremely easy for the occupiers, having a right of common upon land out of the parish, to defraud the parson by removing their cattle at the time they were about to produce such tithes; and it was a great hardship that the tithes of those animals which had been supported on lands within the parish during a great part of the year, and which, being *animalia fructuosa*, were not liable to agistment-tithes, should avoid the parson's tithe by such means: to obviate which, and to remedy that mischief, this statute passed. But this reason does not apply to agistment-tithe, which is the tithe of the land. So long as barren cattle, in respect of the eatage of which agistment-tithe is due, are kept and depastured upon lands within the parish, the tithe is payable; on their removal, their place in the parish will be supplied; there can be no fraud in removing them, and the parson can lose nothing and sustain no prejudice by their re-

móval; and therefore the statute could not mean to protect him against it.

1790.

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v.
Saul.

Eyre C. B. — This is a bill brought by the vicar for agistment-tithe, for barren cattle fed and depastured upon lands within and adjoining to the parish. His title to agistment-tithe within the parish is founded on an endowment of all small tithes, drawn up in a form which shewed an intent to comprehend all not particularly excepted. This is a good *prima facie* title; the defendants avoid the claim in different ways; they say, as to the places within the parish, that it is divided into distinct districts, and that there are certain ancient payments or *moduses* payable for agistment-tithe generally applicable respectively to each of them; they also insist on certain payments in lieu of the agistment of sheep.

To begin with the sheep *moduses*: the vicar's counsel have mistaken the defence, which amounts to this, that there are no sheep within this parish in respect of which some payment is not made, *i. e.* there are no unprofitable sheep. As to the fact of these payments, no witnesses are called to disprove their existence; but the plaintiff says, that this is only a wool-tithe, and not good because no tithe for wool is due before severance. True, but I do not know why a customary payment antecedent to the tithe being due, may not be a good custom: thus, a payment in *March* instead of clipping time; and if so, I do not think this necessarily a tithe of * agistment and not of wool. By the canon law, the tithe of wool upon sheep removed from one parish to another, was apportioned between the clergy of the different parishes. We do not adopt the canon law, but allow a tithe of agistment for sheep removed out of the parish: nevertheless, where the canon law is founded in great equity, I do not see why a custom similar to it is not good. As to the objection to the time being indefinite, those words may be expunged: and upon the whole, I think these *moduses* good in point of law.

A custom-
ary mode of
tithing
sheep; pay-
ing 1d. per
head for
sheep
brought
into the pa-
rish after
Candlemas
and clip in
the parish,
in lieu of
tithe of
wool; 3d.
per head for
sheep in the
parish be-
fore *Candle-*
mas and
carried out
before
shearing
time as an
average
payment for
the wool
carried out;
will be

good: the latter payment may be applicable to the wool-tithe, though not then due.

As to the other *moduses*, there is no objection to the manner of pleading them; but it is objected, that they are not sufficiently proved, and if they were, still that they are no bar to the vicar. As to the fact of their existence, there is great looseness and uncertainty in the evidence; the witnesses do not know what is meant by agistment; on the other hand, the fact of payment is clear, and also the fact of no claim having been ever made before the present suit; and, undoubtedly, it is not fit that we in this stage should decide upon it; therefore if an issue is prayed, the vicar is clearly entitled to it.

*[1335]
Unneces-
sary words
used in the
laying a
modus,
which
would
make it
indefinite,
may be ex-
punged.

But the vicar says, that he is not barred by these payments, and that his title is under the endowment of all the small tithes. He

A *modus*
for agist-
ment-tithe.

1790. — can only be entitled to what the rector had a power to give; and the cases cited by the defendant's counsel upon this point are decisive. Therefore if these payments have existed immemorially, and in lieu of the tithes of agistment as well as hay, the vicar has no right. (a)

Ellis
v.
Soul.

paid to the rector, is a bar to the demand of that tithe by the vicar, although by the endowment he has all the small tithes.

Agistment-tithe is the tithe of the herbage eaten by cattle not tithable; it is not tithe of the improvement of the cattle.

As to the claim of agistment-tithe for the cattle fed upon the commons out of the parish, I am clearly of opinion, that tithe of agistment is not within the meaning of the statute of *Ed. 6.* Agistment-tithe is the tithe of the herbage, not of the cattle; and it may be defined to be paid in respect of the herbage of cattle not tithable, with as much propriety as of barren cattle. That it is not the tithe of the improvement of the cattle, is clear from the observation, that no tithe-agistment is due for cattle fed on oil-cakes, &c., and the case of no tithe of agistment being due for after-pasture, is decisive as to the nature of the tithe. (b)

When grass has been cut for hay, no tithe is due for the after-pasture.

Agistment-tithe is not within the 2 & 3 *Ed. 6.* c. 13. s. 3.

*[1336]

What was the intent of this statute? It was to remedy the numerous frauds which might be practised, and to prevent the losses which might be sustained by the parson from the difficulty and almost impossibility of ascertaining where the tithes of the cattle *were due. It would be impossible to know, on an extensive wild common like this fen, where the young were dropped, &c. To remove this difficulty, and prevent frauds, the statute passed; but the reason does not apply to the tithe of the produce of the soil. Whenever that question became important, the remedy was obvious, by taking the boundaries.

On the plaintiff declining to take issues on the *moduses*, the bill was dismissed with costs.

H. 31 Geo. III. A. D. 1791. Scac.

Jones v. Le David. [Eyre's MSS.]

S. C.
4 Wood's
Decr. 372.
If land be
in its na-
ture apt. for
tillage, it
shall imme-
diately pay
tithe, not-
withstand-
ing a great
expence be
incurred in
inclosing,
draining, &c.

LORD C. B. Eyre. — This bill was filed by the impropiator of the rectory of *St. Peter* in *Caermarthen* for tithes of corn on two acres. The defence was under the 5th section of the 2 & 3 *E. 6.* c. 13. which is thus: " Provided always, and be it enacted by the authority aforesaid, that all such barren heath or waste ground, other than such as be discharged from the payment of tithes by act of parliament, which before this time have laid barren and paid no tithes by reason of the same barrenness, and now be or hereafter shall be improved and converted into arable ground or meadow, shall from henceforth after the end and term of seven years next

(a) *Anon.*, 1 Mod. 216. *Woodnoth v. Lord Cobham*, Bun. 180. *supra* 653.

(b) See also *Scarr v. Trin. Coll.*, Anstr. 760. *infra* 1445.

after such improvement fully ended and determined, pay tithe for the corn and hay growing on the same; any thing, &c." The sixth section having some relation to the fifth, I will state that also: "Provided always, and be it enacted by the authority aforesaid, that if any such barren, waste, or heath ground, hath before this time been charged with the payment of any tithes, and that the same be hereafter improved or converted into arable land or meadow; that then the owner or owners thereof shall during seven years next following from and after the same improvement, pay such kind of tithes as was paid for the same before the said improvement."

1791.

Jones
v.
Le David.

The land, the tithe of which is demanded, is part of a common adjoining to the town of *Caermarthen* belonging to the burgesses, formerly lying open and depastured by cattle and geese, which in the year 1785 was inclosed and converted into tillage. One end of it was wet, and there was a considerable expence incurred in draining as well as in inclosing. It was partly sowed in the spring of 1785 with oats, and without any manure produced, the witnesses for the plaintiff say, a fine, strong, luxuriant crop; and it is not denied on the other side that the crop was valuable. In the autumn of the same year it was limed and sowed with wheat, and produced a reasonably good crop. As to the quality, condition, and value, of this ground before the inclosure, the witnesses on the part of the plaintiff and those on the part of the defendant differ so essentially, that it would be difficult to extract from the evidence any fact respecting those particulars upon which the court could rely; and as we think it not necessary to the decision of the question, that the condition, quality, and value of the ground, should be more distinctly known, we lay all the heap of contradictory evidence with which this cause has been loaded entirely out of the case; and the merits of the cause will then be reduced to this short question: Whether land capable of producing a crop of corn without extraordinary expence in tillage, is protected by the statute of 2 & 3 E. 6.? And we must say, as my lord *Hardwicke* said in the case of *Stockwell v. Terry*, "we must be guided by the determinations made on the act," all which have been agreeable to lord *Coke's* comment, 2 *Inst.* 655., where the rule laid down is, if land is in its own nature so barren as not to be proper for agriculture, after it is improved, it shall not pay tithe; but, if in its own nature it is fit for tillage, but, by reason of wood or other accidental circumstances it was not turned into tillage before, upon the taking away of that accidental circumstance it shall pay tithe presently on being turned to tillage. Lord *Hardwicke* in that case supposes, that the question whether land is in its own nature so barren, as not to be proper for agriculture, would be to be determined by the answer to another

[1337]

Supra 823.

1791.

Jones
v.
Le David.

[1338]

question, what was necessary to the first crop? Mr. *Solicitor General* in his argument expressed a doubt from whence lord *Hardwicke* collected his doctrine. If *suapte naturâ sterilis* be the true definition of *barren* in this statute, lord *Hardwicke's* doctrine is founded on the very nature of the thing. If land will bear a crop of corn without expence in tillage, it must be decisive, that this land is not *suapte naturâ sterilis*. Inclosure is essential in some situations to the enjoyment in severalty, without being essential to the fertility. Draining may be a great improvement, may render land more productive, which would be productive without it. It is not therefore because a great expence is incurred by inclosing and draining land without more, that such land shall be protected by the statute. If a piece of this land had been staked out and inclosed with a temporary fence of rod hurdles, we see no reason to believe that it would not have produced corn, if ploughed and sowed; or hay, if the grass had been left to grow on it. This inclosure therefore was but a mere change of the mode of occupation. If the statute had provided, that in all cases, land converted into arable ground or meadow, shall be discharged of the tithe of corn or hay growing thereon for seven years, this land might have been discharged: but, when land of a certain description only is to be discharged, we are to inquire whether the land sought to be discharged is of that description; and as to this land which is the subject of this bill, it is so satisfactorily proved by lord *Hardwicke's* criterion not to be of this description, that we are obliged to say that this land is not protected by the statute.

Infra 1594.

Supra 1197.

The nature of this case does not require that we should enter into a particular consideration of the authorities in the books from the case of *Stockwell v. Terry* upwards to the first determination that was made upon this statute. But I would observe that with regard to two more modern cases, that of *Byron v. Lamb* in the court of chancery, which was determined by me, sitting for the Chancellor, and the case of the *Balbeck inclosure* in *Northumberland*, which was in this court, we do not mean to question either of those decisions. In the first case there was a large bank to be thrown down before the plough could go upon it: in the latter case from the exposed situation of the ground, no corn could go there without first incurring the expence of stone walls to protect it from the severity of the climate(a). These were expences necessary to the first crop; the ground could not have been made to produce the first crop without them; these expences were more essential to give fertility to the soil than manure. I will add that we do not mean

(a) See that case *supra* 1197., but the fact here stated does not appear there; and that report of the case was extracted from Lord C.B. *Eyre's* notes.

to conclude ourselves from construing this statute very liberally in other cases that may arise, as far as we can do it consistently (I will not say, with all the determinations upon the statute, but) with the principle upon which those determinations were founded. As to one of those determinations in particular, in the case of land newly gained from the sea, if that determination can be supported at all, it must be by other reasons than those assigned in the book; if such land is not protected, it must be, because it is not within the description in the statute, because it is neither barren, nor waste, nor heath ground, but from the moment of its existence as land, is fertile, inclosed, and capable of tillage, and therefore of a description which the particularity of the statute cannot attach upon (a).

Decree an account with costs.

H. 31 Geo. III. A. D. 1791. Scac.

Markham v. Laycock. [MS.]

LORD C. B. *Eyre*. — This is a bill which is brought by the plaintiff, Mr. Geo. Markham, who is vicar of *Carlton near Skipton, in the county of York*, for an account of tithes of hay, agistment, calves, wool, and lamb. His title as vicar was admitted. The vicarage is endowed. An endowment appears to be registered in the registry of *York* in the book, intitled, “*Ordinatio Vicarie Ecclesie de Calton in Craven*,” and is dated on the second calends of *July* in the 6th year of the archbishop’s pontificate. By this it appears that the vicar was endowed with the tithes of butter, cheese, milk, calves, pigs, and all other tithes (those of corn and grain only excepted). — This evidence of the endowment, with the admission of the plaintiff’s title, was his *prima facie* case. It was admitted on the part of the defendants, that as to the tithe of agistment on the lands in the occupation of the several defendants (the *Hall* farm only excepted) the account could not be resisted on any legal ground, though, as is the case in many other places in that part of the country, the vicar had not been in the actual perception of that species of tithe.

1791.

Jones
v.
Le David.

[1339]

S. C.
4 Wood’s
Decr. 373.
A modus of
3d. payable
at Midsum-
mer by the
occupiers of
every ox-
gang of
land, the
oxgang
containing
16 acres of
arable, mea-
dow, and
pasture, af-
ter the rate
of 7 yards
to the pole
or perch, in
lieu of the
tithe of hay
arising on
the said ox-
gang, is
void for un-
certainty.

On the part of the defendants a *modus* was insisted upon of 1d. for a barren cow; but this *modus* was in the course of the cause given up; so that as to the agistment an account will be to be directed generally, and also with regard to the tithes of calves, wool, and lamb, arising upon lands in the occupation of the defendants, the *Hall* farm excepted.

(a) See also *Gawden v. Gilbert*, 1 Wood’s Decr. 89. *Alcock v. Hilyard*, ib. 279. *Hankin v. Fotheringham*, 2 Wood’s Decr. 184. *Warwick v. Collins*, 2 M. & S. 349. *infra*. *Lord Selsea v. Powell*, 6 Taunt. 297. *infra*. *Kingsmi v. Billingsley*, 3 Pri. 465. *infra*.

1791. **But** on the part of the defendants *Mowhouse* and *Sugden*, who
Mowhouse
 v.
Loyack
 [1340] are the occupiers of the *Hall* farm, a *modus* has been insisted upon of 3*l.* in lieu of all tithes arising upon or in respect of that farm. Upon this part of the case there was a great body of evidence tending to prove that the farm is an ancient farm, consisting of specific lands of a determinate quantity; that no tithes in kind have been paid in respect of it, and that there has been an annual payment of 3*l.* made to the vicar in respect of tithes arising upon that farm, which payment appears to have been treated by the vicars themselves, Mr. *Tennant* one of those vicars in particular, as a *modus*. On the other hand there is certainly an appearance of rankness in this payment considered as a *modus*; and there are terriers, one in the year 1684, another in 1748, and, I think, seven others extending down to the year 1777, in all which tithe-hay in kind is said to be due to the vicar from the *Hall*, which I take to be the *Hall* farm. If, upon the evidence, the vicar thinks fit to pray an issue as to this *modus*, we think it cannot be refused. If he should decline an issue, we shall be satisfied to make a decree upon the foot of this *modus*, as far as respects the land in the occupation of the several defendants parcel of the ancient *Hall* farm.

On the part of the other defendants, occupiers of land not parcel of the ancient *Hall* farm, they plead in their answer that there is a *modus* payable at *Midsummer* of 3*l.* for each and every oxgang of land, containing sixteen acres of arable, meadow, and pasture, after the rate of seven yards to the pole or perch, by them occupied within the parish, in lieu of the tithes of grass made into hay yearly, arising within the said oxgang of land; and the defendants state the quantities of arable, meadow, and pasture land occupied by them respectively in the years for which an account of tithe-hay is demanded by the bill.

In the terriers it is said, "Tithe of hay in kind for the *Hall*; the rest of the parish every oxang 3*l.*" It is perfectly reasonable to understand the terriers to import that there was a customary payment in this parish of 3*l.* by the oxgang in lieu of tithe-hay. But this payment is described in the terriers in such very general terms, that it goes but a very little way indeed towards establishing the particular customary payment insisted upon by these defendants. And the difficulty of establishing in evidence the *modus* which the defendants have pleaded is increased in consequence of the modern payments in lieu of tithe-hay having been generally computed not by the oxgang, but by the day's mowing. Not that the modern payments, accounted for as they are in the evidence of this cause, afford any contradiction to the terriers; for the vicars who appear to have introduced that variation, appear also to have acknowledged in the very act of doing it, that the true payment was by the ox-

gang, and that the modern payment was substituted by them only as a more convenient mode of collecting the oxgang payment. Thus explained, they become rather evidence of a customary payment by the oxgang than a contradiction to it. But, though we can get thus far, yet it is also certain that a defendant who insists upon a customary payment in lieu of tithes, is bound to state that payment, and to prove it with such particularity, that for a duty which is certain, the recompence may also appear to be certain; and therefore what the oxgang in this case consists of both as to quality and quantity of land; how, by whom, and when the payment is to be made, and in lieu of what, were necessary to be stated. And it must be a legal consequence clearly deducible from what is so stated, that the recompence is certain. The defendants amplify the description of the customary payment in the terriers, as I have before observed in this manner; that there is payable at *Midsummer 3d.* for each and every oxgang of land containing sixteen acres of arable, meadow, and pasture, after the rate of seven yards to the pole or perch, by them occupied in lieu of grass made into hay yearly arising within the said oxgang of land. As they put it, they use the term *organg* as a known denomination of a specific quantity of arable, meadow, and pasture land in any man's occupation. Now it certainly is not a term well applied to a specific quantity of arable, meadow, and pasture land. *Dufresne* in his Glossary, 668. defines the *bovata terræ*, which is the oxgang, to be *modus agri, sic dictus, quòd tantum terræ contineat, quantum bos unus (vel par boum) arare potest*. In another place, we find an *organg* and *orgate* of land to be *mensura quatuor jugerum, voce signante, BOVIS ITER*.

A term so defined seems not to be a very proper denomination for meadow or pasture land; and I believe it would be very difficult to find an instance in Domesday, or any other ancient record, or in any of the ancient charters, or in any of our writs or judicial proceedings, in which the *bovata terræ* and the *organg* are not applied exclusively to arable land. Although this be so in point of strict definition, yet we agree it is enough for the present purpose, if, in fact, a specific quantity of land in this parish has acquired by usage this denomination of *organg*. And this will answer an objection, that an *organg* will contain a quantity of land more or less according to the quality of that land, and may therefore contain different quantities of land in different parts of the parish; from whence it was argued that the *modus* was repugnant by confining the *organg* to one specific quantity; for if the *organg* can be received as the mere denomination of quantity, there is no room for that objection, which proceeds upon the ground of the *organg* necessarily varying according to the quantity that can be ploughed in a year.

1791.

Markham

v.

Laycock.

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1791.

Markham
v.
Laycock.

In a case where there has been a customary payment, and there has been reason to expect that the payment insisted upon may be made out in evidence, and may be supported in law, it has, in modern times at least, been permitted to us to treat it with some degree of indulgence; we send the *modus* to be tried by a jury, who negative the inaccurate *modus*, and find the true one. But we are now to see how this *modus* is proved in point of fact, and that brings us to the consideration of the evidence laid before the court in support of it. It is truly observed on the part of the plaintiff, that as to the particular *modus*, the evidence is very loose and unsatisfactory. It consists of a reputation and tradition delivered down to the witnesses by old people, that they paid for their tithe-hay at the rate of 3*d.* per *oxgang*; and they go so far as to say, that the *oxgang* contained sixteen, or about sixteen, customary acres. There are not more than three witnesses who go so far. I do not observe that any one of these witnesses speaks to that part of the *modus* which describes what an acre is, viz. at the rate of seven yards to the pole or perch; nor do they speak to what is more material, to the sorts of land which are to be included in the admeasurement of the sixteen acres. This is the more extraordinary, because in the ordinary course of things one should expect to find a *modus* for the tithe of grass made into hay, at so much an acre, or so much for every sixteen acres, to be the acre or sixteen acres of that land whereon the tithable matter was to arise; whereas the *modus* is here calculated upon the acre of lands arable, meadow, and pasture. If I might indulge conjecture, I should think it very probable that the payment by the *oxgang* was calculated upon the whole quantity of land, whether arable, meadow, or pasture. But my conjecture goes further, that these payments were for ancient farms consisting of so many *oxgangs* each; I think there are in the evidence allusions to those ancient payments so understood. The reason given by Mr. *Tennant*, one of the former vicars, for varying the mode of collecting is, that it was impossible to collect in *Carleton* by the *oxgang*; for that estates, when they came into new hands, were split into many parts and sold off. Now there could be no impossibility if the *oxgang* was to be computed upon the actual state of the occupation upon the day when the tithe was to be demanded; if upon every sixteen acres consisting of all the arable, and all the meadow, and all the pasture that each man had, there would be no difficulty at all. On the other hand, if the *oxgang* consisted of specific lands, which had been anciently so described, if they had gotten into different hands, and split, there would be a difficulty, and it would be impossible for the vicar to make his collection. So it seems to me, that the witness in this manner of conversing about it, supposes that

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he understood the *oxgang* consisted of specific lands, and not of particular lands that might have come from time to time into the hands of different persons. Mr. *Roberts*, who is the person that mentions this, speaks of some paying two *oxgangs*, and some for proportions of an *oxgang*, where part of the estate had been sold off, which seems to me to favour my conjecture. And indeed, if this *oxgang modus* is ever to be supported, it must be supported, as I apprehend, as a farm *modus*, and not as a parochial *modus*. As a parochial *modus* it is not supported in fact by the evidence, which puts an end to this part of the cause; for if there be not reasonable *prima facie* evidence, the court ought not to send this cause to an issue, merely to give the defendant a chance of making out a case which he could not make out before the court. But I will go further, and add, that if this *modus* had been sufficiently supported in fact by the evidence, even if it were now established by the verdict of a jury, still we could make no decree upon it; for we are of opinion that this *modus*, as it is laid, is bad in point of law. I have already said, that it is necessary to the validity of a *modus*, that it should be a certain recompence for a certain duty. There is a class of cases upon this head of *moduses* void for uncertainty, in *Startup v. Supra 587.*
Dodderidge, 2 *Ld. Raym.* 1158. They were referred to, and considered by us in the case of *Travis v. Oxton*, where a hay-penny was set aside on the ground of uncertainty. If the *modus* had been established in that case, not one of the ancient messuages would have paid if they happened not to have mowing lands; and if they had, and all the mowing lands had belonged to one messuage, the only recompence would have been 1*d.* which was unreasonable, and therefore the *modus* was void. (a) *Supra 1066.*

As the *modus* is stated in this cause, the *oxgang*, in respect of which the payment of 3*d.* is to be made, is to consist of arable, meadow, and pasture, and without any specification of proportions; and there is nothing to pay for an *oxgang* of arable only, or an *oxgang* of arable and pasture. By the fluctuation of lands in this parish, it may happen that the arable may be occupied separate from the meadow or pasture; as, for instance, suppose the number of acres in this parish would make 100 *oxgangs* at sixteen acres to an *oxgang*, and each of those *oxgangs* consisted of arable, meadow, and pasture; there would then be 100 threepences to be paid to the vicar in satisfaction of his tithe for the meadow. But suppose [1344] one half of those *oxgangs* to have no meadow to be distributed amongst the other fifty; in that case, the vicar could have but 3*d.*; which brings the case within the same principle as that of *Travis v. Oxton*. And this will not be the case, if we suppose,

(a) See also *Wolley v. Hadfield*, 3 *Pri.* 210. *infra.* *Hardcastle v. Slater*, *supra* 784.

1791. that it were proved, which it is not, that this *modus* was payable for every oxgang of land, whether it had any meadow or not in it, so as to make the whole parish contribute a certain sum at all events to the vicar, which sum shall be neither more nor less; because in that case (the case I first put) all the lands in the parish reduced to their own proper oxgang contribute their proportions to one fixed and certain recompence for the tithe of the meadow land, which will be always payable to the vicar, out of the specific lands, independent of the uncertainty and fluctuation of the occupation.

Markham
v.
Laycock.

The conclusion is, that this *modus*, being neither proved in fact, nor good in law, the plaintiff will be entitled to tithe-hay, which he prays by his bill. The only question is, whether the vicar prays an issue upon the *modus* for the *Hall* farm. The vicar praying such issue, his Lordship added, "Let there be an issue upon that *modus* in the terms of the answer to be tried at the summer assizes. As to the residue the defendants are to account: the *modus* not being proved, nor being good in law, the defendants are to account for the tithes, and the tithe of agistment, calves, wool, and lamb. And reserve the consideration of costs till further directions of the court shall have been taken.

June 2, 1792.—The jury found that there was no such *modus* as alleged by the defendant, but found another *modus*, and indorsed specially. And the court ordered an account to be taken of the tithe of hay and agistment, and what was due from the defendants for the *modus* as found by the jury, but without costs; but the plaintiff was to have costs at law, and they further ordered the bill to be dismissed without costs as to calves, wool, and lamb.

[1845]

H. 31 Geo. III. A.D. 1791. In Canc.

Heathcote v. Mainwaring. [3 Br. Ch. Rep. 217.]

A real composition cannot be established without shewing the deed by which it was created, or proving its existence.

IN this case it was stated by Mr. *Lloyd*, and admitted by the counsel for the defendant, that in the cases of **Robinson v. Appleton*, and in †*Hawes v. Swain*, Exchequer sittings after *Trinity* 1789, it was settled, that a composition real could not be established without shewing the deed by which it was created; or proving the actual existence of such a deed; for, otherwise every bad *modus* would be set up as a real composition; and there would be no line drawn between them; and the Master of the Rolls agreed this to be so. (a)

* *Supra* 1161.

† *Supra* 1324.

(a) See also *Sawbridge v. Benton*, 2 Anstr. 37. *Chatfield v. Fryer*, 1 Pri. 253. *infra*. *Knight v. infra* 1397. *Rotherham v. Fanshaw*, 3 Atk. 628. *Halsey, infra* 1531. *supra* 809. *Bennet v. Neale*, Wightw. 324. *infra*.

Tr. 31 Geo. III. A. D. 1791. Scac.

1791.

Pyke v. Brock. [MS.]

Pyke
v.

Brock.

KING moved to consolidate seven tithe suits, where there were several bills filed against seven different defendants.—No cause was shewn.

Defendants may move to consolidate several tithe-suits upon affidavit that they do not defend by subscription.

Eyre C. B. said, that the court always required an affidavit, that the defendants do not defend by common subscription. But, as no cause was shewn, the order was made absolute. (a)

M. 32 Geo. III. A. D. 1791. Scac.

Tamberlain v. Humphrey. [MS.]

THIS was a bill by the impropriate rector for agistment-tithe in the parish of *Llanegin*, in the county of *Merioneth*, against *Humphrey* and others. The bill stated the plaintiff's title as purchaser of the rectory and tithes in 1761, his own seisin; and ever since a general perception of tithes great and small, except the tithes in 1784, which he demised to his two co-plaintiffs for three years: that the defendants occupied lands upon which they agisted cattle. The bill also charged, that the defendants until 1784 had paid tithe-agistment or a satisfaction, and that the curate, who was also a defendant, claimed agistment-tithes.

S. C.
4 Wood's
Decr. 386.

[1346]

The answer of the defendants insisted, that neither the plaintiff nor his predecessors ever received tithe of herbage or agistment, and put the plaintiff to prove his title to the rectory. They admitted, that for several years past the plaintiff received certain tithes, and the officiating minister received the rest. They admitted also, that they had agisted cattle upon their lands; but denied the right of the plaintiff to an account of agistment-tithe without shewing an actual seisin or possession of such tithe; and insisted, that the curate doing duty was entitled to tithe-agistment as part of his stipend; and that a *modus* of 4*d.* for every farm was payable to the curate in lieu of all such tithe, and that such a *modus* was in fact a payment to the rector, if entitled to any, being in ease and part of that stipend which he must otherwise pay.

The curate claimed by endowment, prescription, or otherwise, certain money payments; but disclaimed title to tithe-agistment, conceding it to the plaintiffs as their right.

Partridge and *Jones* for the defendant, produced evidence from the Augmentation Office, wherein the rector was said to be entitled to corn, wool, and lamb, without mentioning more, though more had been actually paid, *viz.* geese and pigs. A terrier of 1776, 4*d.* for every tenement of land commonly called tithe-hay.

(a) See *Knighley v. Brown*, 16 Ves. 344. *infra*.

1791. A terrier 1780, the like; and they proved that no agistment-tithe, as such, had ever been paid, the same being never demanded. They argued, that the plaintiffs were not entitled to more than the monastery from which they derived title; there being then a vicar, as there must have been then of every church by *stat. H. 4. c. 12.* and the present ecclesiastical incumbent being vicar in idea of law, for once a vicarage and always a vicarage. *Parry v. Banks, Gibson's Codex.*
Tamberlain v. Humphrey.
Supra 353.
Supra 330. *Britton v. Wade, Cro. Ja. 515.* Besides which, a curate is capable of enjoying tithes, as appears by *Brereton v. Tamberlane*, before Lord Hardwicke, 2 *Ves.* 425. (a) Also, they argued, that as there was no vicar, there remained nobody to contest the point, and no decree could be made.

Lloyd and Richards for the plaintiff, were stopped by the court.

Lord Chief Baron.—The several grounds of defence set up are these: 1st, Here is no vicar before the court. 2d, Here is a *modus* to cover the demand of those tithes. 3d, The rector has openly a defined quantity of tithes, though the *modus* should not be good.

[1347]

A curate may hold tithes.

As to the first, Lord *Hardwicke's* opinion cited from 2 *Ves.* takes away the first defence; for it decides that a curate can hold tithes. Besides which it does not appear that there ever was a vicar here. In *Wales* the curates have rights of this sort. It is not necessary in all cases to have the vicar before the court: but this curate is a sufficient party, if any such is wanted.

A *modus* of tithe-hay may be for hay, if any or not.

As to the second defence, this *modus* cannot be sustained on the evidence. The evidence is 4*d.* for every tenement of land, but the *terrier* calls it *tithe-hay*; and one witness proves payment of 4*d.* when no hay grew. But it is very common in antient *moduses*, that it should be an annnal payment to cover hay, if any.

Agistment is a new species of tithe, newly demanded in *Wales*, and in many countries: if you could shew that because agistment was never paid, that therefore it is not payable, you might succeed; but, not else: but, admitting it to be due, you cannot cover it by a *modus* which does not apply to it.

Agistment-tithe due to the rector, though not among the enumerated articles given to him in the Ecclesiastical Survey of H. 8. and though never paid, and though

As to the third defence, if it had been proved, that the *modus* had been paid for tithe-agistment to the vicar, the disclaimer of the curate would not hurt the defendant: but the plaintiff has all tithes generally except what the vicar can prove to be due to him. The survey does not affect to be a correct description of the things, but of the value of the receipt. It is always loose evidence, and very often contradicted. If usage had been with it, it would have been of weight; but the evidence is against it; for the rector has been paid what is not mentioned in the survey. The survey does not specify the vicar's tithes, and the *terrier* does not specify the 4*d.* to

(a) See also *Yaleman v. Cox*, *supra* 986.

be for hay. It will be of no use to the parish whether we decide for the plaintiffs or not; because, if the plaintiffs are not entitled, the defendants say the curate their co-defendant is entitled. If the defendants had stood on the ground that agistment is not due, because never paid before, I must have decreed against them: (a) but I should have been unwilling to give costs: however, as the principal defendants have indemnified the rest, I shall decree costs accordingly.

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a *modus* for
tithe-hay be
paid to the
curate.

H. 32 Geo. III. A.D. 1792. Scac.

[1348]

John Howell Esq. v. Thomas Frankis, Henry Frankis, Benjamin Dugard, Robert Dugard, Benjamin Hyett, Esq. and the Right Rev. Samuel, late Lord Bishop of Gloucester, since deceased, by original and amended bill:

AND

The said *John Howell* v. the Right Rev. *Richard*, the present Bishop of *Gloucester*, by supplemental bill. [MS.]

BURTON for the plaintiff. — This is a bill by the plaintiff against the ordinary, rector, and portionist of the parish of *Upton St. Leonard's* in the county of *Gloucester*, to have the plaintiff quieted in enjoyment of a portion of tithes of some lands called the *Banhold* or *Bayhold*, and of an exemption for other lands called *Upper and Lower Farm*, as being abbey lands discharged at the time of the dissolution, and also for an estate called *Printenash*; which he claims to be exempt as extraparochial.

The plaintiff has demised the greatest part of these lands to the defendant *Dugard* as his tenant tithe-free; and they being sued for tithes by the lessées of the bishop of *Gloucester* as portionist, the present plaintiff has filed this cross-bill for the purpose of interposing to maintain and establish his own title. The bishop of *Gloucester* as defendant, by his answer, insists, that he is ordinary and proprietor of this rectory, and also a portionist: the defendant *Hyett*, the lessee of the rectory, disclaims, and the defendants, the *Frankises*, as lessees under the bishop of his portion of the abbot's tithes, called *Bondhold*, insist adversely, that their right extends to tithes upon all the estates of the plaintiff in lease to the *Dugards*. The defendants, *Dugards*, insist upon the covenants in their lease to hold their land tithe-free.

After stating the particular evidence in support of the plaintiff's title on each head, the plaintiff's counsel admitted, that he could not distinguish the particular lands covered by the portion called

1. Whether a bill of peace lies for an exemption against tithes.
2. Whether a bill of peace lies, without shewing the particular lands whereof tithes, or an exemption from tithes is claimed.
3. Whether such a bill lies to stay a suit between individuals and without multiplicity of suits.

(a) *Hickes v. Woodeson*, 4 Mod. 336. *supra* 550. *Grysmen v. Lewis*, Cro. Eliz. 446. *supra* 165.

1792. *Potts v. Durrant.* so, there is a clear relief, at least to the extent of tithes subtracted. And a demurrer being entire, if bad in part, it is bad in the whole, and must be over-ruled altogether. *Metcalfe v. Hervey*, 1 Ves. 248. *Chetwynd v. Lyndon*, 2 Ves. 451.

Lord Chief Baron.—This demurrer is right in form and substance. In form it is a proper demurrer to the whole bill, because if it had been partially applied to the matter of the glebe, still the effect of it would have been that the whole bill must have been dismissed as against the defendants, by reason of multiplicity in that particular; for the bill must have been dismissed against them as to the tithes with which they were charged, and that as against them is in fact the whole bill. As to the want of denying combination, it is too late now to object to that omission; the old cases have been over-ruled, and probably at the time those cases had authority, the charge and denial were more particular than they are at present. (a) In substance it is very true that a bill may embrace matters quite distinct, affecting different defendants; but to sustain such a bill, it must appear that the decision of one point is *involved necessarily* in the disposition of the other points, as may happen to very different estates in any general arrangement of *the same* trust. The case in *Hardres* prepares us to think the matters in this bill are very distinct. If, indeed, the bill had charged that *all* the defendants had confounded the glebe, and therefore the tithes could not be got at till the glebe was ascertained, such a case might have warranted joining the two matters by their necessary connection.

Hotham, B. and *Perryn, B.* concurred. *Thomson, B.* was absent in the Duchy Court.

The court were proceeding to allow the demurrer; but on motion for the plaintiff, citing *Mit.* 174. they permitted him to amend his bill on paying full costs. (b)

[1354]

H. 32 Geo. III. A.D. 1792. Scac.

Clavill v. Oram. [MS.]

S.C.
4 Wood's
Decr. 396.
1. Posses-

LORD Chief Baron.—This is a bill by an an impropriate rector for tithes in *Bradford* in the county of *Wilts.*

The title is proved, and therefore he has the common law right.

(a) Cooper on Equ. Plead. 183.

(b) (Tr. 33 Geo. 3. Anstr. 259.)—Motion by *Abbot* for the defendant (*Adair*) to produce certain documents, (namely, a plan or map, and rental or particular of the defendant's estate among his papers, describing divers portions of glebe land in his possession), for the inspection of plaintiff. This was opposed by *Burton*, as obliging him to shew his whole title-deeds, from the accidenta circumstance of another person's pro-

perty being mentioned therein, and rested on *Davers v. Davers*, 2 P. Wms. 410.

By the Court.—You have stated in your answer an instrument which tends to throw light on the claim of the plaintiff. The confusion arises from the act of your ancestor, in laying the lands together; and you are now bound to assist as much as possible in clearing up the difficulty that arises from it. Ordered accordingly.

The defendants have set up a defence, and we are to pronounce, Whether it is sufficient for a decree or an issue.

The defence is in two parts: The lands they occupy, they say, are part of the chapelry of *Atworth*, and that this is part of the manor of *Bradford*, within the parish of *Bradford*, and that their lands were formerly part of lands of the dissolved monastery of *Shaftsbury*, and that they are exempt, 1st, Either by prescription; or 2d, Because there was a unity of possession in this abbey of lands and rectory for time immemorial; but the last defence, I understand, is substantially given up.

Therefore the only question is, Whether title by prescription is proved enough for a decree or an issue.

The fact of *non decimando* is properly laid as the foundation of this defence, and the proof is very clear on this fact. The law is, however, that the fact *per se* is no defence for laymen, unless they can cloath themselves with the character of representatives and derivatives of the abbey, in which case they may prescribe *de non decimando*.

They shew themselves occupiers of lands of certain denominations, and that the abbey at the dissolution possessed lands of such names, and that such were in lease to *Webb* the year before the dissolution, under the general description of "*situs et capitale messuagium de Atworth.*"

This is proved, because the minister's account 4*l.* 16*s.* 8*d.* are of the site of the capital messuage of *Atworth*; and this is regularly accounted for as part of the abbey possessions.

It appears this was afterwards demised to lord *Herbst*, and a particular was then made out, and is now produced, ascertaining the very lands occupied by *Webb* corresponding with the present denominations. And the same lands were afterwards demised to sir *F. Walsingham*. It is an extraordinary circumstance, that the defendants have shewn, with so much certainty, the identity of these lands so far. But there is a chasm in deducing the title from sir *F. Walsingham* to themselves. And the excuse made is (but not proved), that their title-deeds were burnt on a particular occasion; and therefore we have no conclusive evidence that these lands are the very lands of the abbey.

The plaintiff has a right to say this is not absolutely conclusive, and he may require proof of the excuse alleged for not producing the title deeds; and, at the trial, if this excuse be not proved, the presumption will be of a concealment to hide a flaw in the title.

We have now got one step. These lands, as to which the *non-decimando* is proved, were parcel of the lands of an abbey, which abbey might have a right to prescribe. But to shew that the abbey

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sion by a greater abbey at the time of the dissolution, coupled with a subsequent *non decimando*, is not alone sufficient to exempt lands from tithes.
2. Possession by an abbey at the time of the dissolution, coupled with a subsequent *non decimando*, is evidence sufficient of immemorial possession, to warrant an issue on title by prescription.
3. Qu. Whether unity of possession by greater or lesser abbey may not be of different effect.

[1355]

1792. had a right to prescribe, it must have been in possession time immemorial.

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And I can never agree, that because the abbey was in possession at the time of the dissolution thereof, an immemorial possession is to be presumed, which is nevertheless necessary.

Possession is evidence of seisin in fee, as taking of explees in a writ of right proves a seisin at the time of taking the explees; but neither law nor reason carry the title further back. The use of conveyances is to fill up this very purpose. You cannot infer from seisin at one time a seisin at a prior time. If you could, conveyances to deduce titles would be superfluous.

However, fortunately for justice, this title to the tithes and lands, and the *non-decimando*, all clearly relate to the abbey.

Here is evidence from *Domesday* that these lands did belong to the abbey time out of mind; and therefore we have ground to presume the abbey had an immemorial possession.

As to title by unity, the possession was not in the abbey. The lease to *Webb*, prior to the dissolution, destroys the unity. (a) I will not go at large into this subject; but it may be of very different effect if pleaded as to one of the greater or lesser abbies. For the lesser abbies are not protected by the statute, which gives a continuation of exemption to lands in the hands of a greater abbey. A material difference, therefore, might be as to this sort of abbey.

It is not the question here, whether one might doubt about the abstract truth of this prescriptive right in the abbey itself; but the question is, Whether it is possible to apply this sort of title to these possessions; and the court will so apply it if it can, which there seems very reasonable cause for doing here.

[1356] If the plaintiff wishes to have an issue, he ought to have it,—not merely as rector, but on account of the difficulty of the case.

Let there be an issue in the terms of the answer, as far as it states the prescription.

(The jury found for the plaintiffs at law, defendants in equity. Bill dismissed with costs both at law and in equity, 4 *Wood's Decr.* 397.)

H. 32 Geo. III. A. D. 1792. Scac.

Fryer v. Sims and two others. [MS.]

S. C.
4 *Wood's*
Decr. 390.
The mar-

THE bill, which is for an account of tithe-hay, states, that by virtue of some deed or other legal means, the rectory impropriate of *Longney* in *Gloucestershire*, and all tithes, &c. have been, for

(a) In *Page v. Wilson*, 2 Jac. & Walk. *infra*. Sir T. Plumer M. R. remarked, that this doctrine attributed to the court is inaccurate, as the contrary had been decided in *Cowley v. Keys*, *supra* 1308. See also *Porter v. Bathurst*, 2 Ro. Rep. *supra* 373.

many years, together with other real estates, vested in trustees in fee for certain charitable uses created by the will of *Hen. Smith* esq. long since deceased: that by lease of the 10th *Feb.* 1787; the then trustees demised the rectory to the plaintiff for 21 years from *Lady-day* 1786, whereby the plaintiff became entitled to all the tithes, save the vicarial tithes, and save that those of a particular part of the rectory called are payable to the vicar, and that the plaintiff hath ever since *Lady-day* 1786 been in possession of the rectory under such lease: that *Joseph Sims* hath ever since *Lady-day* 1786 occupied several lands within the rectory, and particularly in a common meadow called *Madam* or *Smadam*: that the defendant *Browning* hath occupied several in a common meadow called *Brimpool Mead*, and the defendant *Bacon* in *Madam* or *Smadam*; no part of which lands lie within the part tithable to the vicar: that each of the defendants have cut and carried away hay without setting out the tithe, or making any satisfaction for the same, although frequently applied to by the plaintiff: it prays therefore an account of all hay-tithes of the defendants upon the said common meadow, from *Lady-day* 1786.

The defendants by their answer say, that they cannot set forth the title of the plaintiff other than as hereafter, but believe that the plaintiff and his father have been lessees, but refer to such proof of title as the defendant can make: they believe that the plaintiff is and has been in the possession of the rectory under a demise of some trustees; but submit that the trustees are not entitled to all tithes save the vicarial, &c.: they admit occupation in the common meadow called *Madam*, *Bunny Pool Mead*, in the bill called *Brimpool Mead*, and *Smadam*, and set forth in what manner: they all admit using the land like other common meadows, and cutting the hay without setting out the tithe notwithstanding demand, but submit they were not bound so to do: they have ever heard and believe from the information of their predecessors for 100 years back, that all the common meadows were exempt: they have particularly been informed and believe that plaintiff's father, the lessee, informed a new tenant that no tithe was due; that he once returned some, when informed for what paid, and that he never received or demanded any: that the lords, on failure of one *Cope* a tenant, kept the tenements in hand two or three years, but that tithes were never demanded, and that they were by general reputation tithe-free: that the plaintiff's first demand was in 1785. They then insist upon exemptions; for they have been informed and believe, that this rectory belonged to the abbey of *Great Malvern* at the time of its dissolution in 31 *H.* 8. and so from time immemorial with the manor of *Longney*: that the common meadows are held partly of the said manor by copy of court roll, or by leases for years or for:

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ginal abstract is attached to the judgement.

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lives : and that the part of the meadows whereof tithe is claimed by the bill have from time immemorial been granted and demised by the lords of the manor for lives in possession, and in reversion, or for years, or for lives according to the custom of the manor ; and that such part of the common meadows was before and at the time of the dissolution demesne lands of the said manor, and granted or demised as aforesaid ; and that the other part of the said meadows was freehold by lawful means exempt and discharged : and that such manor and lands came to *H. 8.*, and have ever since been held by him, and all others having the same so discharged ; and that all such lands, and particularly the defendant's, have been from time to time granted and demised as aforesaid by the said lords of the manor according to the custom of the manor, and have been held and enjoyed, discharged and acquitted of the payment of tithes : they have heard, that the manor, together with the rectory, came to the hands of the predecessors of the trustees, and thence to the trustees, for the purposes mentioned in the bill, by some grant of the crown ; and that the several copyholders and leaseholders now hold under the said trustees, as lords of the manor : they believe, that the vicar is not entitled to any tithe of the said meadows, but on the contrary that they are tithe-free.

[1358]

Upon further search, as the plaintiff had proceeded, they put in a supplemental answer, by which they say, that they had recently discovered certain ancient instruments, viz. an indenture of 4 *H. 8.* being a conventual lease from the prior of *Great Malvern* to *Kellock* of the site of his manor of *Longney*, with all the demesne lands, meadows, feedings and pastures, with the appurtenances, and with the tithes, as well great as small, by reason of the said demesne lands with other their premises to the said prior and convent of right issuing from all those demesne lands, meadows, and pastures whatsoever, formerly to the aforesaid site of the manor belonging, in the hands of whatsoever tenants of the lordship, by reason of any grant or lease of any prior and convent, as fully and amply as any farmers theretofore were used to have and receive, and as between the tenants they were judged for the bettering thereof.—2. The minister's accounts for the year from *Michaelmas* 31 to *Michaelmas* 32 *H. 8.* whereby it appeared, that the tithes claimed belonged to the said abbey as portionists, separate and distinct from the tithe belonging to the rectory.

Mr. *Burton* for the defendant.—It will be first necessary to recapitulate the case. The plaintiff's bill is for tithe-hay on about four acres of a common meadow called *Madam* or *Smadam*, in the occupation of the defendant *Sims* from *Lady-day* 1786. The plaintiff's title is a lease of the rectory from seven out of 24 trustees dated the 10th of *Feb.* 1787. The trustees are entitled in fee as lay im-

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propriators, together with other estates to charitable uses under the will of one *Smith*, and they as rectors are entitled to all tithes except the vicarial tithes. The defendant *Sims* in his first answer admits the occupation of $2\frac{1}{4}$ acres in *Madam*, and $1\frac{1}{4}$ acre in *Smadam*: he alleges an immemorial non-payment; and on the part of the plaintiff, his father and grandfather (former lessees), and on the part of the trustees themselves, whilst in their hands after the failure of a tenant, not merely a *non-claim*, but a *positive disclaimer*, by information to new tenants, and once even by return of composition taken by mistake: they then insist upon an exemption by unity of possession, alleging information and belief, that the rectory and manor had both belonged immemorially to the abbey of *Malvern*, and came so to the hands of the crown; that the defendant's lands were part of the common meadows, which common meadows were demesnes of the manor, and that the defendant's lands had immemorially been granted out, exempt from tithes either by copy of court roll, or by leases for lives or years according to the custom of the manor, and are now so held under the present lords the trustees: they deny the receipt of any vicarial tithes within these meadows, and particularly, within the defendant's lands.

But further search having produced a discovery that the defendant's title was to the tithes themselves, not merely to an exemption, he by supplemental answer disclosed it to the plaintiff, stating a lease in 4 *H. 8.* by the abbey to *Kellock* of the site of the manor and the demesnes, with the tithes as well great as small by reason of the demesnes to the abbey issuing from the demesnes, and as fully, &c. He stated also the minister's accounts for the year after the dissolution, taking notice of the above lease; and drew this inference, that the tithes in question belonged to the abbey as *portionists*, and not as rectors. [1359]

In support of this case we proved the defendant's land to be part of the common meadows called *Madam* and *Smadam*; that it was held under *Fryer* and others who hold under the lords of the manor by the particular names, which turn out to agree with the names in the minister's accounts: and what is most material, we proved uniform non-payment both to the rector and vicar; uniform reputation as to all the common meadows which lie under the lapse of the water; uniform non-claim on the part of the rectors and their lessees; uniform declarations from their predecessors, and even a return of a composition when taken by mistake. We then produced, 1st, the conventual lease to *Kellock*, 4 *H. 8.* of the site of the manor, the demesnes, and tithes of the demesnes, which belonged to the abbey by reason of the demesnes. 2. We produced a conventual lease of the rectory to a different person in 6 *H. 8.* and all the tithes to the rectory belonging, but containing no exception of

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the tithes leased to *Kellock*. 3. We produced a new lease to *Kellock* of 8 *H. 8.* of the manor and demesne tithes with some slight variations. 4. We produced the minister's accounts of 32 *H. 8.* noting *Kellock's* lease as still subsisting. From this evidence we treated the plaintiff's attempt as an experiment to disturb immemorial possession; and we argued, that the tithe of the defendant's lands did not belong to the rectory, in which right alone the plaintiff claimed them; for if they had ever belonged to the rectory, they could not have been demised to *Kellock* under such a description, as "by reason of the demesnes, &c.;" and the subsequent lease of the rectorial tithes must have contained an exception. It was sufficient for us to prove the rector not entitled; but we argued further, that they did in truth belong to us; because all the common meadows under the lapse of the water had never yielded tithes; because these, and particularly this defendant's lands, were originally parcel of the demesnes of the manor, and from time to time granted out [1360] together with, not the rectorial tithes merely, but *all* the tithes arising on them, some by copy, some for lives, and some for years, but all according to the custom of the manor.

The plaintiff had little evidence on his part. The 1st was, the grant of the rectory with the tithes of corn and hay only at the rent of 12*l.* 6*s.* 8*d.* 2d, The testimony of one *John Bate* to the collection of tithes from all *arable* land in the parish, whether inclosed, or common field. He had also evidence of our lands being holden by copy of court roll. But the plaintiff's principal reliance is upon what he calls his common law right, and the ingenuity of his counsel. Now, if it appears that the tithes belong to a portionist, and not to the rector, what becomes of his common law right, and of a claim made only in character of rector? As to the evidence of the plaintiff, it proves nothing, and is contradicted by us. The grant, it is said, is evidence that certain tithes of corn and hay belong to the rectory, and the rectory to the trustees; we admit it. The witness, it is said, proves collection from the *arable* lands; we admit it; our case is confined to the common meadows, common to all the parish; these are our lands; here plaintiff's proof squares with ours: there is no evidence to prove the tithes of the common meadows were ever taken; no evidence of payment even to the vicar of vicarial tithes. Nor has the plaintiff thought it prudent to produce his lessor's grant of the manor.

Then as to the argument of the counsel, they say, the first defence is grounded upon unity of possession. True, and then apparently good, and possibly so still. The second defence was granted, they say, by *singular indulgence*. It was by no means singular, it is frequent; even at law a new plea may be added; nay, on a new discovery a new trial is granted: there too the defendant may plead

double. Why then should not this be allowed in a court of Equity? In all other cases it is common; and if it were not so, it would be cruel; and courts of Equity would become a shop for raking into stale and obsolete claims, and wresting property out of the hands of the possessors by surprize and management. The second defence is grounded upon a portion of tithes — wherefore discharged, it is said — discharged — a mistake — discharge is not claimed on the ground of a portion, but of title to the tithes themselves. The question then as to this part fairly stated, is, 1st, Whether there be any portion? 2d, Whether the defendant's lands are within it?

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In order to render the existence of a portion the less credible, the plaintiff's counsel state generally that portions were granted anterior to parishes, for which they refer to 3 *Burn's E. L. tit. Tithes*, 41. and *Watson*, 43. To obviate therefore any prejudice on this head, and lay a foundation for other observations, let us pursue the subject a little further, by recurring to two or three of the best authorities. Whether all or most of the portions were created before parishes, seems very uncertain. One reason for these portions might be, as *Dr. Burn* observes, the lord of the manor's estate extending into what is now apportioned into distinct parishes; for there were tithes before the present distribution of parishes took place. But it is clear to demonstration from *Selden*, that this is not the only reason. *Seld. Hist. of Tithes*, c. 11. p. 1227. gives very many instances of arbitrary consecrations of tithes before the time of the most known council of *Lateran*, that is, from about *A.D.* 1000 to about *A.D.* 1200, by conveyance from the owner of *all* or *part* to any church or monastery at his pleasure, and cites a writ out of the *Register* 36 b. intelligible only from those arbitrary consecrations, p. 1253. After stating the writ at length, *Mr. Selden* comments upon it thus: "What can the intent of this writ be, other than that the bishop, the king, and many other grandees of the kingdom did usually grant or collate the tithes of their demesnes, &c.?" In c. 12. he shews that churches and tithes were anciently conveyed without the assent of the ordinary; and in c. 13. in the latter part of *sect.* 1. he treats more of arbitrary consecrations of tithes, &c. and speaks of a passage in *Lindwood*, and another in *Bracton* referring thereto. In *Spelman's* larger work upon tithes, 143. c. 29. *sect.* 4. "Abbots, priors, and such religious men had *two* sorts of tithes, one incorporate to their houses, which I call Monastical tithes; the other depending upon their functions, as they were parson of any parish; which therefore I call Parish tithes. The first of these came unto them as their very lands did, by plain point of charter; for before the *Laugdune* and *Lateran* councils, every man might bestow his tithes upon what religious house or person he listed: and then the founders

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“ and benefactors of religious houses did ordinarily grant *all*, or
 “ *some portion* of their tithes to those houses, as by a multitude of
 “ precedent thereof appeareth. From hence it arose, that the mo-
 “ nasteries had so many *portions* of tithes, or rents for them (which
 “ we call pensions) out of so many several and remote places of the
 “ kingdom : and therefore all these tithes (how unjustly soever they
 “ were conferred upon them) were *de corpore monasterii*, and passed
 “ undoubtedly to the king.” In *Degge* 225. “ Since parochial
 “ right of tithes was settled, *prima facie* all tithes not appropriated
 “ belong to the rector : yet notwithstanding the parson of one
 “ parish may prescribe to have a portion of tithe in the parish of
 “ another ; and so might abbots, priors, and other religious houses
 “ prescribe to have portions of tithes in parishes, whereof they
 “ had not the advowsons, and by consequence, the patentees of
 “ the crown, &c. may claim the same by prescription in the abbots,
 “ &c. and *the usage since the dissolution* will serve to prove the
 “ prescription and usage in the abbots that they held the same so
 “ time out of mind.” And in 3 *Burn*, 411, and *Gibbs*. 663. “ what-
 “ ever original these portions might have, they are in law so dis-
 “ tinct from the rectory, that if one who hath them do purchase the
 “ rectory, the portion is not extinct, but remaineth grantable.”

It is then urged, that it is incumbent on the claimer of a por-
 tion to prove the portion, and to shew when it vested. We admit
 that we are bound to prove it ; and one question is, whether we
 have not done so ? But to shew when it vested, we deny that we
 are bound, except by such evidence as proves the origin of such
 things as originated before time of memory ; and that sort of evi-
 dence we have given ; exactly such as is above laid down by sir
S. Degge, viz. constant and immemorial non-payment.

With a view to shew that we have not proved the existence of
 a portion, they next observe upon our written evidence ; and 1st,
 on the lease to *Kellock* ; and it is asked, were all the lands, freehold
 and others, demised to *Kellock* ? We answer, no — only the site,
 the demesnes, and such of the tithes of the demesnes, as belonged to
 the abbey by reason of the demesnes, and the rents of certain lands
 described as formerly part of the demesnes, but then in the hands
 of other tenants. We admit therefore it was *not a lease of the whole*
manor, and this will at once ease the court of much argument. But,
 when it is further urged, that nothing passed except the demesnes
 then in the hands of the abbot, this we deny rather for truth's sake,
 than any thing else, because the whole appears by the lease itself to
 have been theretofore in lease “ as fully and amply, &c.” And
 farther, the rents of others were in terms demised. But one word
 on demesnes. See *Co. Copyh. sect. 3. 4. 8. 12. 13. 14. Cro. Ja. 559.*
Cow. verb. Demesnes. Jac. Law. Dict. verb. Demesnes. Wats.

c. 42. 356. cites 1 Co. 46 b. *Burn's E. L. Modus*, 411. 1 Ro. Abr. 653. Deg. p. 2. c. 16. *Burr.* 1273. *Stephenson v. Hill, Ley*, 77. *1 Salk. 185. *Brittle v. Dale*, 3 Lev. 405. 1 Ro. Abr. 653. pl. 7. from all which it appears that copyhold tenements are parcel of the demesnes of the manor.

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*[1363]

It was then urged, that we insist the lessee *Kellock* was entitled to receive the tithes from the copyholders, &c. whereas the reservation of the barn in the lease proves some tithe to be received by the rector. Now the reservation of the barn is undoubtedly evidence of some tithe being due to the abbey as rectors, and we do not deny it, nor can we do so consistently with the supposition of a portion; but it does not prove any particular tithe to be so due, much less the tithe of the demesnes. And as to the copyholders, &c. we never did contend that *Kellock* became entitled to their tithes —no —we contend, that the copyholds being originally part of the demesnes, were granted out together with their tithes, like all such other parts of the demesnes as comprised the portion of tithes. One other observation was made upon this lease, viz. that if the demesnes be granted to one, and the services to another, the manor is gone. Not so, if for lives only. But it is immaterial, whether it be or not, for the destruction of the manor could by no possibility destroy a property in the tithes antecedently granted out to others, and vest it in the rector. Such rights must still continue. The remarks made upon the words “site of the manor;” “as may be better judged, &c.,” “the rent;” “the reservation of a heriot;” “the condition to find horses, &c. for butler, steward, &c.” “the covenant to repair,” I omit, as tending only to prove an admitted fact. But I cannot dismiss this instrument without remarking, that no answer has been given to the important phrase, “the tithes *by reason of the demesnes.*”

Upon the lease of the rectory in 6 H. 8. it was said our remark on “proprietors and rectors” was not fair. But such a description is not the usual one, and if so, why is the remark not fair? we did not urge it as of any considerable weight, if alone. But it is said, the exception of the tithes leased to *Kellock* is unnecessary; and why? because they could grant no more than they had. True, they could *pass* by their grant no more, but they might *grant* more, and by such grant they would oblige themselves to make a compensation: for that very reason therefore the exception was absolutely necessary for their own security.

Our next evidence, the 2d lease to *Kellock* in 8 H. 8. has not been observed upon. This therefore remains an uncontested proof, that *certain* tithes at least *arising on the demesnes* were in lease at the same time with the rectorial tithes, but to a different person, [1364] and as a distinct thing.

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Supra 658.

Supra 894.

[1365]

Upon the minister's account, it is said, 1st, that the *firma manerii* comprizes *Kellock's* rent of 8*l.*; and therefore it is no proof of there being a *portion* of tithes. But, I answer, it tends to prove it in this way. 1st, It shews, that the distinct leases of the rectory and of the demesnes granted twenty or thirty years before still remained so. 2d, It shews that the lease of the demesnes was also a lease of the tithes of the demesnes, because it refers to it, and so describes it. It is next objected, that the customary rents are accounted for separately. But this is not denied, nor was it ever imagined that the customary holdings or the tithes thereof, which were granted out of the demesnes before time of memory, were part of those demesnes which were demised to *Kellock*; but the customary rents being separately accounted for, tends in no degree to disprove the existence of a portion of tithes. In a case like this, it has been said, the court would require very strong proof before they would set up a portion of tithes. Exactly the reverse. In

Bunb. 189. *Downes v. Mooreman*, the court decreed in favour of a portion, though none of the evidence expressly mentioned it as such. Wherever immemorial enjoyment is found (and it is so in this case) the court will upon the *slightest* evidence intend or presume a portion of tithes or any other thing that will support it consistently with the established rules of law. Like a *modus* proved in fact, it will be supported in law, though you cannot discover the reason of it, if it does not appear contrary to reason. There is a strong host of cases upon this head: I will name one, which applies in more points than one. It is the case of *Stephenson v. Hill*, 3 *Burr.* 1273. An action was brought against a customary tenant of a manor for tithes. There was a verdict for the plaintiff, subject to the opinion of the court of King's Bench on proof of immemorial usage, and that the manor and rectory had immemorially belonged to one of the greater monasteries. After much argument, the court held, that the exemption ought to be presumed; and why; because the customary tenant might have alleged a prescription in the lord for himself and his tenants, the freehold being in the lord. Hence too this inference, fair and undeniable, that wherever a person can prescribe in a *non-decimando*, supposing no proof to appear of the existence of tithes; there, the same person may prescribe for a portion of tithes, supposing evidence to prove that the tithes had existence. For the only reason why a person is allowed to plead a *non-decimando* is, because he (or those under whom he claims) is or were a person capable of tithes in pernaney, that is, capable of having the whole rectory or a portion.

If this be a portion, the next question is, whether the defendant's lands are not within it. Does *Sims* hold the copyholds? for it is said the rent of *Yelphe's* 52*s.*, of *Bullock's* 16*s.* True, but by the

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minister's accounts those rents were paid for a small part in the meadows, a great deal in the arable; and the plaintiff's own witness proves *Sims* landlord to hold by copy of court roll. But then it is said, if a portion did exist, yet it extended no farther than the manor-farm, and defendant's lands are not within that. But by what rule of evidence is this deduced? It is not necessary for us to contend that our lands were or were not included in *Kellock's* farm. His lease proves that some tithes belonged to some of the demesnes as a portion. But, if other parts of the demesnes were enjoyed by the grantees together with the tithes, or, what is tantamount, without yielding tithe to the rector, this affords a natural and irresistible inference, that the portion extended also to such other demesnes. It is then boldly inferred, we cannot account for the non-receipt of tithes. We might retort upon them, and ask how they account for non-payment, not to the rector only, but to the vicar also, unless upon ground either of property in the tithes, or of legal exemption. But let us examine a moment whether we do not sufficiently account for the non-receipt of the tithes. We have before proved any supposition to be sufficient which is consistent with the evidence, and not inconsistent with law. Suppose then that long before time of memory the abbey obtained a grant of the manor and of the tithes of the demesne meadows; subsequent to that, suppose they obtained a grant of the rectory. The portion most unquestionably would not have merged, or been united with the rectory, but would have remained distinct. Suppose then, that after the acquisition of the manor, but before the 1st of *R. 1.* they had granted out parcels of their demesnes together with the tithes of such parts of them as lay within the portion, and as appurtenant; suppose, for instance, the copyholds (probably the earliest) were so granted; can there be a possible doubt, but that they would so continue at this day? The same custom which has confirmed their estate in the land, would confirm with it their estate in the appurtenances (*viz.*) the tithes. Suppose then, that either about the same time, or afterwards, the abbey granted in like manner other parts of their demesnes for lives, or for years, or upon any other customary holdings; what reason is there why the tithes of these parts should not in like manner continue with the grantees of these parts? Suppose next, the abbey to lease out the site of the manor, that is, the manor-farm together with the residue of the demesnes, and the tithes arising on such of them as lay within the portion, these would be properly enough described by the words of *Kellock's* lease, used in their narrowest and most popular signification. Nor would it be necessary to except those tithes which had immemorially gone with the copyhold and other customary holdings. All this is supposable; nay, a most probable course of events, and perfectly con-

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sistent with the existing muniments of the abbey, as well as the evidence. For 1st, the copyholds continue, and continue to yield no tithe in the meadows, either to the rector or the vicar. 2d, The same is the case as to such leaseholds of the meadow as are not comprehended within *Kellock's* lease. 3d, It is the same also with such parts of the meadows as are held under *Kellock's* lease, which lease (by the way) most evidently shews that different parts of the demesnes had been granted out at different times. 4th, The bailiff's accounts are perfectly consistent with these suppositions. 5th, So is likewise the plaintiff's newly-discovered evidence. What then is the result? It necessarily is, that the tithes of these demesne meadows are distinct from the rectory at this day, and still belong to the several grantees, as appurtenant thereto, and belong to them as portionists.

A difficulty however is suggested, that if those tithes belong to the manor, then what tithes are left for the rector? for some he certainly appears to have had. I answer, the portion extended to the demesnes only, and to such part of them only as lay under the lapse of the water.

But after all, the portion is stated only for the sake of truth, and because there appeared to be one, and the defendant's lands appeared to be within it; and the only proof of the existence of the tithes is the very same evidence which, if it proves their existence, proves their existence as a portion. But take it any way, the defence is clear. If there be a portion, the defendant's lands are either within it, or they are not. If they are within it, the tithes are his. If they are not within it, the exemption is clear by legal prescription. If there be no portion, the defence is the same, and for the same reasons. Nay, even if tithes exist and are rec-

[1367] torial, under this evidence they must be held to have always gone to the copyholders from the rector with their land, the same ecclesiastical person having always been both rector and lord of the manor. Besides all which, these are predial tithes, the subject therefore of an action at law, either on the statute, or by ejectment. There is no possible ground therefore on which the plaintiff can succeed in this experiment.

As to the costs, it has been said, we ought to pay for our double defence. I will not harass the court with repeating arguments upon that head. But if we succeed, we shall have our costs of course, because they were never yet denied to a defendant on the failure of a bill of experiment.

Immemo-
rial enjoy-
ment of
tithe by a
defendant
may, if he

Lord C. B. — In this case the plaintiff stands upon his common law right of rector. The defendant has shewn the rector not in the perception of all the tithes; a vicar in possession of some; tenants of the site of a manor and certain demesnes in possession

of others; and also other lands, a whole floor, paying none at all. The inference from this evidence is, that the rector's right is very precarious. That being so, it lets in every reasonable title which the evidence will support. A portion may exist against him. It is also true, that where persons derive their title to exemption from spiritual persons, they may apply it to prescription. I have never thought it applicable to a composition real, or other particular title, without some particular evidence; but here there is no doubt; they might have prescribed clearly. The question then is, whether a mistaken answer shall defeat the defendant? But the court has frequently gone so far as to decide against the plaintiff where the evidence for the defendant is clear, though his defence is not in form correct. (a)

The bill therefore must be dismissed, and, because it is a bill of experiment, with costs.

The three other Barons concurred.

though the defence be not stated with formal

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derives title under spiritual persons, either be used as evidence of the existence of a portion of tithes, or may be applied to prescription, and in such a case the court will dismiss a rector's bill with costs, correctness.

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[1368]

Blacket Bart. v. Langlands. [MS.]

THIS was a bill in which the plaintiff stated himself to be seised in fee of the rectory impropriate of *St. John* otherwise *St. John Lee* in the county of *Northumberland*, and to be entitled to the tithes of corn and grain arising upon certain lands situated within the said rectory called *Cocklaw*, which comprized three farms called *East Farm*, *West Farm*, and *Cocklaw-hill-head*; that the defendants were the occupiers of those farms, and had reaped corn, &c.: that they pretended, that they paid 5*l.* a year as a *modus*; but the plaintiff insisted that the 5*l.* a year which he received, was not a *modus*, but a quit-rent: the bill therefore prayed an account of the tithes, and that the defendants might pay the value of them.

S. C.
Anstr. 14.
A plea, being a bar to the whole bill, overruled by a defendant's answering to what is covered by the plea.

The defendants, as to so much of the said bill as prayed a discovery, whether they had not some and what quantity of corn and grain on their lands, and what were the values thereof in the respective years mentioned in the bill; and as to so much of the bill as sought a payment from the defendants, of the several tithes by the bill demanded; pleaded in bar, that the abbot and convent of the abbey of *Hexham* were in ancient times seised to them and their successors of all the tithes of corn and grain arising upon certain lands within the said rectory called *Cocklaw*, consisting of

(a) On this question, see *Wilmot v. Hellaby*, 2 Ves. jun. 625. *infra* 1430. *Barker v. Barker*, 5 Pri. 357. *infra*. On the general question, *Wightw.* 398. *infra*. *Scott v. Airey*, *supra* 1174. *Strutt v. Baker*,

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three farms (describing them as in the bill); that upon the dissolution of the abbey by *stat. 31 H. 8.* the said tithes were vested by the said statute in the crown; that queen *Elizabeth* by her letters patent granted (*inter al.*) all the said tithes to sir *Christopher Hatton* knight; that the said tithes have by divers mesne assignments been duly conveyed to and are vested in *John Errington*; and that the said *John Errington* being so seised of the said tithes, and being seised of the said farms in fee, demised the said farms to the defendants discharged of the payment of the tithes of corn and grain. And as to the residue of the bill, the defendants answered by saying, that they did not know whether the plaintiff was seised of the rectory impropriate of *St. John Lee*; by admitting, that the lands in question were within the parish of *St. John Lee*, and were in the occupation of the defendants respectively during the time charged in the bill; and by saying, that they did not pretend, that the annual payment of 5*l.* was a *modus*, but that it was a quit-rent.

Chapman
v. *Turner*,
1 Atk. 54.

The *Solicitor-General*, *Barton*, and *Rossilly*, contended, that this plea was bad for several reasons, which they mentioned; and (among others) that it was over-ruled by the answer, the defendants having answered parts of the bill which were covered by the plea. They insisted, that the plea was in substance a plea to the whole bill: that the bill prayed no relief, but payment of tithes; and sought no discovery, but what was necessary to that relief: that the plea being to every part of the relief prayed was a plea in bar to the whole bill: that the proper kind of a defence for a plea was, where the defendant insisted on one point, as a bar to the plaintiff's demand; but here the defendants put other facts in issue by their answer; such as, whether the plaintiff was rector. *Gilb. Ch. 58.*

Abbot for the defendants said, that there was no instance of a plea being over-ruled because it did not cover enough; and that was in fact the objection now made.

The court thought that there was great weight in some other objections which were made by the plaintiff's counsel; but said, that it was unnecessary to decide on those objections, because the plea was clearly over-ruled by the answer; and they ordered the plea to stand for an answer, with liberty to except.

N.B. The defendants chose rather to put in an answer.

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Scott v. *Allgood* and others. [MS.]

S. C.
Anstr. 16.
A *modus* of

THE original bill in this cause was filed by Dr. *Scott*, as rector of the parish of *Simonburn* in the county of *Northumberland*, against

the defendants for an account and payment of agistment-tithes; stating the defendants to have been in the occupation of farms within the parish of the different denominations mentioned in the bill.

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The defendants by their answer insisted on a *modus* in lieu of agistment-tithe; and they filed a cross-bill against the rector, praying that the *modus* might be established. The *modus*, which was stated in the same way in the answer to the original bill and in the * cross-bill, was thus stated: The defendants stated, that they were respectively in the occupation of ancient farms (naming them) within the parish of *Simonburn*: that the parish of *Simonburn* was divided into two districts, viz. the district of *Simonburn*, and the district of *Bellingham*: that the whole of the district of *Bellingham* consisted of ancient farms; and that the whole of the district of *Simonburn* before allotments were made under an act of parliament for inclosing certain moors or commons within the district, which act is particularly mentioned in the answer, consisted of ancient farms and of several moors or commons upon which the tenants or occupiers of the said ancient farms had respectively a right of common for their commonable cattle, as appendant or appurtenant to such their respective farms: that from time immemorial within and throughout the whole district of *Simonburn*, and within and throughout the whole district of *Bellingham*, the sum of 1*d.* for each and every ancient farm (except a farm called *Tukets*, for which a general *modus* in lieu of all tithes was paid) within the said districts had been and then was annually at *Easter* constantly and invariably paid and payable by the owner or occupier for the time being, of each and every of the said ancient farms and the lands and grounds thereto respectively belonging, to the rector of the said parish of *Simonburn* for the time being, in lieu and full satisfaction of the tithes of all grass yearly growing and renewing upon the said ancient farms and the lands and grounds thereto respectively belonging, whether such grass was cut and made into hay, or agisted by barren and unprofitable cattle.

1*d.* for every ancient farm in the parish is not a parochial *modus*, but a farm *modus*.

*[1370]

The rector by his answer to the cross-bill admitted that he received the sum of 1*d.* annually from the plaintiffs in lieu and satisfaction of all tithe-hay growing on the farms in the occupation of the plaintiffs.

Burton, *Mitford*, and *Abbot*, for the rector, insisted, that the *modus* could not be established as laid in the cross-bill: that these being *moduses* which were to cover particular farms, the plaintiffs ought to have stated the boundaries and the particular quantities of land of each farm which they alleged were covered by such *moduses*; whereas here they had merely alleged, that they were in possession of such ancient farms (naming them) but not stating the

...1792. quantity of land of which any of them consisted or the boundaries of any of them.

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[1871] The *Solicitor-General*, *Hollist*, and *Romilly*, admitted, that where a bill was filed to establish a *modus* for a particular farm; it ought to state the quantity and limits of the farm; because the effect of the decree establishing such a *modus* would be to exempt those particular lands from the payment of tithes in kind: but, that the *modus* here insisted on was a parochial *modus* for every ancient farm throughout the parish, and a decree establishing it would only establish a general custom, but would not exempt any particular lands: and the occupier of lands within the parish who would avail himself of the *modus* must shew that the farm he occupied was an ancient farm, and of what lands it consisted: that a case perfectly analogous to this was that of a bill to establish a *modus* for every ancient orchard or garden in a parish: that in such a bill it could not be necessary for the plaintiffs to state the number of acres and boundaries of their own orchards: that the *modus* being for all orchards, if it were necessary to state the particular boundaries of any, it must be of all the orchards in the parish, which it would be impossible for the plaintiffs to do: and so in the present case; the *modus* being for all ancient farms, if it were necessary to describe any, the plaintiffs must describe the boundaries and quantities of all ancient farms, those of the occupiers, who are not before the court, as well as their own: that the court had already considered this *modus* as a parochial *modus* by ordering the cross-bills, which were originally three in number, to be consolidated; for if they were to be considered as distinct farm *moduses*, there could be no reason for consolidating them, and the plaintiffs in some of them were by that means deprived of the benefit of the testimony of the plaintiffs in the others of them, who might have been witnesses; that the rector admitted, that a penny was payable by each farm for hay, and if there were no uncertainty as to that, there could be none in the same *modus* extending to agistment, which was the real question between the parties.

Eyre C.B. — This is not a parochial *modus*, nor any thing like it. It is essential when this sort of *modus* is established, that the rector should know what are the particular lands covered by it. He will not know where to resort even for the payment of the *modus*, unless he knows what lands are covered by it. The case of orchards, I think, does not assist you. It is true, that in a bill to establish such a *modus*, the plaintiffs need not set out the quantities and boundaries of their orchards: but that is very different from an ancient farm. The name of an orchard is in the nature of the description of the thing, and the mere inspection will help to ascertain what is an ancient orchard. However, though it be impos-

A bill to establish a *modus* for ancient orchards need not state the quantity and boun-

sible to establish the *modus*, as laid in the cross-bill, which is an application for the extraordinary assistance of this court, it may be a very different consideration, whether the *modus*, as laid in the answer, may not afford such a defence as should prevent the plaintiff from having an account of tithes.

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daries of the
orchards.

The rest of the court were of the same opinion, and the defendants to the original bill proceeded to read evidence to prove the existence of the *moduses* of 1*d.* for each ancient farm for hay and agistment.

A bill had formerly been filed by Dr. *Scott* against a person of the name of *Elliot* for agistment-tithe, and *Elliot* had insisted on a *modus* for 1*d.* for hay and agistment for the ancient farm which he occupied, and which was called *Haughton Strother*. In that cause a person of the name of *Pickering* had been examined as a witness, and was since dead. The cross-bill stated those facts, and stated the evidence which *Pickering* gave in that cause, and interrogated Dr. *Scott*, whether *Pickering* did not give such evidence. Dr. *Scott* in his answer said, he did not recollect what evidence *Pickering* gave, and for the particulars of it referred to his deposition taken in that cause. The defendant's counsel having read this passage in Dr. *Scott*'s answer, offered the deposition of *Pickering* in evidence, and insisted that whatever doubt there might be whether it would be evidence otherwise, Dr. *Scott* had made it evidence by referring to it in his answer, which was the same thing, as if he had stated the deposition in his answer; and that a defendant by referring to any paper makes it evidence; as, when he refers to the answer of other defendants.

Where a
deposition
is not
strictly in
evidence, it
will not be-
come so by
being re-
ferred to in
the defend-
ant's an-
swer.

But the court rejected the evidence; and said, that the *modus* set up by *Elliot* being for a particular farm, which was not in the occupation of any of the parties in this suit, could not be evidence in this cause; and that Dr. *Scott* by referring to it in his answer did not make it evidence, for it amounted only to saying, that he did not recollect the deposition, and that it would speak for itself.

The further hearing of the cause was suspended by some proposals for a compromise, which after a considerable delay were not acceded to. In the mean time *Eyre C.B.* was created Chief Justice of the Common Pleas, and was succeeded as Chief Baron by Sir *A. Macdonald*, and on account of that change in the court the cause was opened again in *Michaelmas 34 Geo. 3.* as if it had never been gone into.

The Solicitor-General (*Mitford*) for the defendant in the cross-cause insisted that the cross-bill ought to be dismissed: that the *moduses* insisted on were alleged by the bill to extend to all ancient farms within the parish except a farm called *Tukets*, for which was

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Supra 526.

Supra 1271.

made an ancient payment in lieu of all tithes, and except two farms in the hands of the rector : that this was alleged rather as a general custom extending throughout the parish, than as a prescription for each particular farm ; whereas in the very nature of payments in lieu of tithes for ancient farms, they must be prescriptions for each farm, and could not be laid as a general custom : that there might indeed be a custom for every householder to pay such a sum in lieu of a particular species of tithes, or there might be a custom for a garden-penny ; but not for every farm which may consist of any uncertain quantity of land : that there might indeed be a *modus* for a park, without setting out its boundaries, 1 *Ro. Abr.* 665. because the boundaries of a park are always known and ascertained, and in such a *modus*, the moment the park is disparked, the *modus* is gone, unless the owner had prescribed for a certain quantity of ground, 1 *Ro. Abr.* 657.: that if there could be such a *modus* laid as a general custom extending throughout the parish ; yet the boundaries of each farm ought to be set out in order that the parson may know where he is to resort for his penny ; it ought to be ascertained with certainty in the pleadings what the lands are to which the ancient payment relates : that in the case of lord *Bagot*, a bill for tithes being filed against lord *Bagot*, he by his answer set up farm *moduses*, alleging that the farms in the occupation of *A.*, *B.*, *C.*, *D.*, &c., were covered by *moduses* ; and then he set out in a schedule a description of all the particular closes of which each of those farms consisted : it was objected, that those descriptions ought to have been set out in the body of the answer ; but the court held, that it was sufficient to set them out in the schedule : but it never was conceived that the setting them out either in the answer or the schedule could have been dispensed with.

N.B. Immediately after the Solicitor General's argument, this cause was compromised. The terms of the compromise were, that both bills should be dismissed ; that the rector's costs should be paid by the parishioners ; and agistment-tithe should not be demanded in future.

[1374]

P. 32 Geo. III. A. D. 1792. Scac.

Lygon v. Bowman. [1 Anstr. 1.]

A BILL had been filed by the defendants against the present plaintiffs for tithes, describing themselves to be impropriators of the rectory of the parish. The answer denied their title as impropriators.

The present was a cross-bill, to obtain a discovery of the title of the defendants to the rectory, and praying a production of the

title-deeds, &c.; and particularly to have a discovery of the title of the defendants to agistment-tithe; and whether the former occupiers of the lands of the plaintiffs had ever paid that species of tithe.

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Lygon
v.
Bowman.

The defendants demurred to the discovery sought; and put in an answer, insisting that they were rightfully entitled to, and in possession of the rectory.

Burton and *Richards*, in support of the demurrer, argued, that the plaintiffs had shewn no title to have the discovery prayed; the defendants being in possession, the court cannot compel them to prove their title to the rectory. The plaintiffs do not even set up a counter claim to it, or pretend that any other is better entitled. In the case of *Selby v. Selby*, last term, the Lord Chancellor expressed a strong inclination to admit a demurrer to a bill, praying discovery of the title under which the defendant meant to support his claim, an ejectment having been brought by him against the plaintiff in equity, who was tenant in possession of the premises; but the demurrer was bad on a ground of form (a); an amendment was allowed, and is not yet decided.

A demurrer will lie to a cross-bill to obtain discovery of the rector's title to the tithes, where the title is not in issue.

The present case is much more strong; here the discovery is sought against the person in possession.

Lord Chief Baron *Eyre*. — Certainly there can be no discovery, if it is prayed by the farmer merely to have a pretext for withholding his tithes altogether, till the impropriator shall prove every item of his demand.

Abbot, for the plaintiff, took several objections to the demurrer. [1375] In form it is over-ruled by the answer; the demurrer is to the discovery of the title, and the answer avers the goodness of the title. Amendments of demurrers are rarely, if at all, granted, and are quite out of the usual practice of the court. It is also bad in substance. By the original bill and answer the title is in issue between the parties, and therefore on a cross-bill the plaintiffs have a right to a discovery of it. *Doble v. Potman*, *Hardr.* 160. Even by original bill they would have been entitled to it in this case: *Heathcote v. Fleet*, 2 *Vern.* 442. *Morse v. Buckworth*, *ibid.* 443. *Brereton v. Gamul*, 2 *Atk.* 241. *Metcalf v. Harvey*, 1 *Vez.* 249. *Moodalay v. The East India Company*, 1 *Bro. Rep.* 471. From these cases it appears that a party sued, or likely to be so, is entitled to pray a discovery whether the party suing, or any other, has the right to the subject in dispute.

Supra 512.

At all events, the plaintiffs are entitled to a discovery whether any payment of agistment-tithe was ever made by the occupiers of

(a) They stated, that in that case the Lord have done so. See the same case again before Chancellor had permitted the defendant to the court, 4 *Bro. Ch. Rep.* 11. amend the demurrer; but he does not seem to

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the lands now held by them; a demurrer covering too much is bad *in toto*.

Burton, in reply.—The answer does not over-rule the demurrer. The discovery prayed and demurred to is of the particular nature of the defendant's title; the answer only avers that they have a title, that they are lawfully seized, without saying how.

In the case before Lord *Hardwicke*, *Metcalf v. Harvey*, the discovery was sought, for the purpose of defending the possession; here to disturb it. In all the other cases the party praying the discovery had some interest in the subject of it; here none is pretended.

If there is any slip in the form of the demurrer, it is open to the defendants to demur *ore tenus* on payment of costs, or the court may grant an amendment. It would be an extreme hardship if, by a slip of this kind, a party were obliged to discover the whole of his title, and set forth his deeds, as is here also prayed; and so to expose himself to the attacks both of the plaintiffs and of every other person.

Eyre C. B.—A demurrer *ore tenus* is only allowed upon new grounds, not where a demurrer in paper, on the same point, has already been over-ruled.

Where, in a suit for tithes, the title to the rectory is in issue, to a cross-bill praying a discovery of the title, the rector cannot demur, although no other title is set up.

If there were merits, one would be inclined to allow an amendment; but what rational objection can the defendants have to say what is the nature of their title, when they must prove it in the other cause?

*It is difficult to draw a line in what cases a discovery ought to be granted; as where the tenant is fearful of being harassed by different claimants of the impropriation. Here the title is put in issue by the original suit, and therefore the plaintiffs are entitled to have a discovery of the nature of it. But the court will exercise their discretion in allowing the plaintiffs to search into the title any further than for the purposes of the suit.

The rule laid down by Lord *Hardwicke* goes very far; and I should not be inclined to follow it to that extent without examining further into the authority of the decision. But here the demurrer is bad upon other grounds, and it is unnecessary to go into that question.

Thompson B.—The demurrer is bad, as covering too much. The defendants are bound to set forth, whether any payments of agistment-tithe have been made by the predecessors of the plaintiffs in their farms.

The demurrer was over-ruled.

*[1876]

M. 33 Geo. III. A.D. 1792. Scac.

1792.

Oliver v. Bakewell and others. [MS.]

Oliver
v.
Bakewell.

S. C.
Anstr. 82.
by the name
of *Oliver v.*
Haywood
and others.
It is main-
tenance for
parishioners
to defend
jointly a
suit brought
for tithes,
and defend-
ants may
demur to a
bill seeking
a discovery
of an agree-
ment to that
effect. In
Mantell v.
Nash, P.
1794, the
court of
Exchequer
allowed a
demurrer
exactly the
same as this
upon the
authority of
this case.
In the case
of the City
of London
v. Ainsley,
Hil. 1793,
Eyre C.B.
said, "As
to *Oliver v.*
Bakewell, it
was clear
that the dis-
covery there
sought was
immaterial,
and for that
reason the
demurrer
was prop-
erly al-
lowed."

*[1382

THE plaintiff, as rector of *Sweepston*, filed his bill, against fifteen defendants occupiers of land within the parish, for an account and payment of tithes, as to some of the defendants from 1st *January*, and as to others from the 5th of *April* 1791; and the bill alleged, that the defendants pretended, that their lands were exempt from the payment of tithes, or that some *modus* or *moduses* had been payable for time immemorial in lieu of tithes within the parish; whereas the plaintiff charged the contrary of such pretences to be true; and, that tithes were payable for all the tithable matters arising on the defendants lands during the times aforesaid. The bill also alleged, that the defendants pretended, that an agreement had been entered into between them and the plaintiff to pay him a composition in lieu of tithes, but that in fact no such composition had been entered into, and that the plaintiff had given the defend-ants respectively six months notice in writing that he would take his tithes in kind, as to some of the defendants from the 1st of *Janu-ary*, and as to others from the 5th of *April* 1791; and the bill charged, that the defendants had entered into some agreement to resist the plaintiff's demand of tithes, and jointly to contribute to the expence of defending any action or suit which might be com-menced by him for the recovery of them.

The defendants, as to so much of the bill as sought a discovery from them whether they had not entered into some and what agree-ment to resist the plaintiff's demand of the tithes in the bill men-tioned, or to pay jointly, or to contribute to, the expence of any action or suit which might be commenced by the plaintiff for the recovery of the said tithes, demurred; and for cause of demurrer shewed, that the same was a matter touching which the defendants ought not to be compelled by a court of Equity to make any dis-covery; inasmuch as a discovery of such a matter might tend to charge the defendants criminally. As to the rest of the bill the defendants answered.

**Burton* and *Hollist* for the defendants admitted, that where several persons have one common right, it is not illegal for them to con-tribute jointly to the expence of any suit in which that right comes in question. But they contended, that the defendants had not in this cause any common right which they could defend. Every de-fendant might have a different ground of defence; one might avail himself of an exemption from payment of tithes; another of a pa-rochial *modus*; and a third of a composition; in which case it would be illegal for them to contribute jointly to those different de-fences: that the bill in this case proceeded upon the idea of the

1792. defendants having different defences; for that the plaintiff had given different notices to put an end to compositions at different times: that the defendants must have either different defences, or the same defence: if different, the discovery would subject them to penalties: if the same, the discovery was immaterial: in either case therefore it ought not to be made.

Oliver
v.
Bakewell.

Partridge and *Romilly* for the plaintiff argued, that it was legal for persons to contribute jointly, not merely to defend, but even to commence suits to establish or maintain any right which they claimed in common, as was decided in *Lord Howard, v. Bell, Hob. Supra 1351.* 91. *Br. Maintenance, pl. 41.* 1 *Hawk. P. C.* 251. *Potts v. Durant*: that the occupiers of land in a parish had a common interest to resist the rector's establishing his right to tithes: that it was only on the ground of their having such a common interest, that a parson could join several occupiers of land as co-defendants in a bill; and that if they had not such a common interest, which they might jointly contribute to maintain, the defendants would have a much better ground of demurrer than that which they had put on the record, namely, that the plaintiff had joined several matters, which concerned only some of the defendants, in the same bill, *Sharp v. Carter, 3 P. Wms.* 375: that if the defendants had one common interest, it would not be maintenance for them to contribute jointly to each other's defence, though they might likewise have distinct defences: that the discovery being immaterial was no ground of demurrer, but of a reference for impertinence, but that in fact the discovery was not immaterial, and might have great weight with the court hereafter as to the costs of the suit.

The court, (*Eyre C. B.* being absent) without calling on the defendants' counsel to reply, allowed the demurrer. (a)

[1883]

M. 33 Geo. III. A. D. 1792. Scac.

Wools v. Walley. [1 Anstr. 100.]

In a bill for the single value of tithes, it is not necessary expressly to waive the treble value.

ON exceptions taken to the answer, it appeared that this bill was for tithes, and prayed an account of the single value of the tithes, and that the defendant might be decreed to pay such single value, but did not expressly waive the penalty; and on this ground,

Alexander argued, that the defendant was not bound to discover upon this bill, as he was thereby subjecting himself to the penalty at law, the plaintiff not having waived the treble value, although he only seeks the single value from this court, which is the same

(a) *Hotham B.* " Either the combination is criminal or it is not; if it is, then the discovery cannot be granted, as subjecting the defendants to a penalty: if it is not criminal, then the discovery is useless and impertinent; and therefore the demurrer must on either ground be allowed. Anstr. 83.

as an account of tithes simply. The constant practice is to waive it expressly; and the case in *Bunb.* 193. (a) must therefore be a mistake, for it supposes this practice antiquated.

Hart, contra, contended that the prayer of the single value was in fact an offer to accept that, and therefore a waiver of the penalty, and relied on *Bunb.* 193.

The court were of that opinion; for a waiver in equity is no bar at law, but only a ground for the interposition of the courts of Equity; and an injunction would be granted against suing for the penalty, as well upon this implied waiver, as upon the most express.

1792.

Woods
v.
Walley.

P. 33 Geo. III. A. D. 1793. B. R.

Mitchell v. Walker. [5 Term Rep. 260.]

DEBT for not setting out tithes under the 2 & 3 Ed. 6. c. 13. The declaration stated that the plaintiff was rector of the parish of *Thornhill*, and as such was entitled to all manner of tithe within the same, except, &c. and that the defendant on 1st January 1791 occupied twenty-two acres of land called *Headfield Closes* within the said parish, and that the tithes of corn and grain yearly arising from the said land of the defendant's within forty years next before the making of a certain act of parliament made in the 2 & 3 Ed. 6. entitled "an act for payment of tithes," and then, were of right yielded and payable, and yielded and paid, to the rector of the said parish, &c. and that the defendant being so occupier, and the plaintiff so being rector, &c. he the defendant on 1st November * 1791 ploughed his said land and sowed the same with corn, &c. and afterwards, &c. reaped, &c. the tithe of all which corn, &c. did of right belong and appertain to the plaintiff as rector as aforesaid, and of right ought to have been separated from the other nine parts thereof, and to have been yielded and paid to him; yet the defendant well knowing the premises, but not regarding the statute, &c. did not justly divide, &c. the tenth part of the said corn, &c. but took and carried away all the said corn, &c. before it was divided, &c. contrary to the statute; the declaration then alleged the value of the tithe taken away to be 4*l.* 8*s.* and demanded treble the value. The defendant pleaded *nil debet*, on which issue was joined.

In debt on 2 & 3 Ed. 6. c. 13. for not setting out tithes, where the declaration stated that they were within forty years next before the statute of right yielded and payable, and yielded and paid, evidence that the land had always been remembered to be in pasture, and had never within living memory paid any tithe, is not sufficient to defeat the action.

*[1884]

This cause was tried at the last *York* assizes before *Buller J.*, when it appeared that the land in question, which was within the parish, as far back as any witness knew, had been in grass, and had been ploughed for the first time within their knowledge in 1791; and no evidence was given of its ever having paid tithe.

(a) *Attorney-General v. Vincent.*

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The statute 2 & 3 *Ed. 6. c. 13.* enacts, “ That every of the king’s
“ subjects shall from henceforth truly and justly, without fraud or
“ guile, divide, set out, yield, and pay, all manner of their predial
“ tithes in their proper kind as they arise and happen, in such
“ manner and form as hath been of right yielded and paid within
“ forty years next before the making of this act, or of right or cus-
“ tom ought to have been paid; and that no person shall from
“ henceforth take or carry away any such or like tithes which
“ have been yielded or paid within the said forty years, or of right
“ ought to have been paid in the place or places tithable of the same;
“ before he hath justly divided or set forth for the tithe thereof the
“ tenth part of the same, &c. under the pain of forfeiture of treble
“ value of the tithes so taken or carried away.”

Chambre for the defendant contended at the trial that the jury were bound to find for him, unless they found that tithes had actually been paid in respect of this land within forty years before the statute, of which there was no evidence: on the contrary the evidence given rather went to rebut such a presumption, and was sufficient to warrant the jury in presuming a grant in favour of the defendant. A verdict however was given by the learned judge’s direction for the plaintiff, with liberty to the defendant to move to enter a non-suit, if the court should think the evidence insufficient to support the action.

A rule having since been obtained to enter a non-suit,

[1385] *Law* now shewed cause against it. — There is no case wherein it has been held necessary to prove that the lands had paid tithe within forty years next before the statute of *Ed. 6.* in order to maintain such an action as the present. Lord *Coke*, 2 *Inst.* 649, 650. treating of this branch of the statute, takes no notice of it. The presumption of law is that all land is tithable; and the *onus* of proving an exemption in favour of any particular land lies on the party claiming it: nor has it ever been held sufficient to shew that the land has not paid tithe before within living memory; though that sort of evidence may be applicable to identify lands in old deeds which were discharged of tithe by some legal exemption; but here no such evidence was given. He was then stopped by the court, as were also

Cockell Serjeant, and *Lambe*, on the same side.

Chambre and *Wood contra.* The objection that there was not sufficient evidence to support the action is decisive; 1st, on the words of the statute; 2dly, on the authority of cases; and thirdly, on the presumption of a grant. 1. The words of the statute are express that no person shall take away the predial tithe which hath been yielded or paid or ought to have been paid within forty years next before the making of the act, &c. The penalty is confined in

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terms to such cases: and if it is to be extended to all tithe, whether paid or payable within forty years next before the statute or not, those words will be rendered nugatory. Now there was not even the slightest evidence offered to shew that this land had paid tithes within the forty years. There can be no presumption of law in this case, because this is not an action for any common law right but for a penalty under a statute, within the precise words of which the party seeking to recover such penalty must bring his case. The statute expressly confines the penalty to cases in which such, *i. e.* predial, tithes had been paid or ought to have been paid within forty years before. But however the presumption may be in ordinary cases, the evidence given in this case affords a strong presumption against the plaintiff; for it goes to prove that the land had always been in pasture, and, consequently, could not have paid predial tithe at any time before. And though this evidence might not be sufficient to exempt the lands from payment of tithes altogether, yet it is a sufficient defence in this action on a penal statute; and the plaintiff may still sue in the spiritual court. But 2dly, the case of *Lord Mansfield v. Clarke*, M. 9 G. 3. C. B. is decisive that some evidence of payment having been made within forty years next before the statute is necessary. The court there granted a new trial for the defect of such evidence for the plaintiff. In the argument of that case was cited another of *Adenbrooke v. Stokes*, tried before Lord Ch. J. *Willes* at *Stafford* assizes 1745, which was a similar action on the statute 2 & 3 *Ed.* 6. for subtraction of tithes; where the learned judge nonsuited the plaintiff for not proving payment of tithes within forty years before the action, in analogy to the limitation of time in the statute. And that decision was cited by Mr. *Wilbraham* before Lord *Hardwicke* in the case of *Rotherham v. Fanshaw*, and approved by the court. 3dly, The nonpayment of tithes within memory was evidence of a grant of the tithes. It was so considered in the case of *Lord Mansfield v. Clarke*. [1386]

Supra 949.

Vide supra
809.

The Court wished the question to be put upon the record if the defendant's counsel thought it with his client; but the other side objected on account of the expence.

Lord *Kenyon* Ch. J. — Since it is necessary for us to give our opinion, I confess my inclination is strongly in support of the action; for though the defendant's argument would have great weight if we were now to decide on the statute of *Ed.* 6. for the first time, yet the usage has constantly been against the necessity of the proof contended for by the defendant under the statute. And I remember many actions tried, where the lands in respect of which the tithes were claimed were lately inclosed, and where the same objection, had it been available, must have prevailed, but the plaintiffs recovered in all of them. The statute of *Ed.* 6. was passed

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soon after the dissolution of the religious houses in this kingdom, before which time the tithes were in the hands of religious men, and the usual remedy for the subtraction of them was in the ecclesiastical courts. But when tithes became lay fees, it was thought necessary to provide a remedy for such injuries in the temporal courts, and therefore the statute was passed for that purpose. Now it is not disputed but that these lands are tithable, and that payment may be enforced by a more extensive mode of proceeding. Laymen cannot prescribe in a *non decimando*. The non-payment of tithe of itself signifies nothing; tithe is every day claimed for lands inclosed out of wastes which never paid tithe before. The only objection then is to the form of the action, which I do not think well founded. The words of the statute extend to tithe paid, "or which of right or custom ought to have been paid." Now what ground have we for saying that tithe ought not to have been paid here?

[1387] The presumption of law is in favour of the rector. And I never heard that a different sort of proof of title was required in this from any other form of proceeding for the recovery of tithes. Mr. Justice *Yates* in a case, the name of which I think was *Kynaston v. Dickson*, thought the same evidence applicable in this as in any other case. In the case cited of *Lord Mansfield v. Clarke* the declaration was drawn differently from the present; for there it was only stated that the tithes had been paid within forty years before the statute; the court went on that distinction; and they ordered the declaration to be amended before the second trial, and the word "payable" to be inserted.

Buller J.—With respect to the presumption of a grant in favour of the defendant, I thought I could not leave that question to the jury without some evidence to support it, and here was none. If indeed it had appeared that this land had been ploughed before, and yet no tithes had been exacted for it, that might have afforded some ground for such a presumption: and according to my note of the case of *Lord Mansfield v. Clarke* [which Mr. Justice *Buller* here read; but the note cited at the bar differed in the respect alluded to], great stress was laid upon that circumstance by Lord Ch. J. *Wilmot*, for he said, "if it appear that this land has never paid and has been constantly ploughed, it will be open to presumption of a grant." But he thought that the *onus* of proving the exemption lay with the defendant.

The other judges concurring, rule discharged. (a)

(a) See Sir *H. Gwillim's* note to *Lord Mansfield v. Clarke*, *supra* 950.

Tr. 33 Geo. III. A. D. 1793. Scac.

1793.

Riddle v. White [MS.]

Riddle
v.
White.

THE bill stated, that the plaintiff is the impropriator, and entitled to all the tithes arising within the parish of *Lanchester* in the county of *Durham* :

S. C.
Anstr. 281.
A saving
clause at
the end of
an inclosing
act, reserv-
ing the
rights of all
persons not
parties to
the act,
does not
save the
rights of a
rector, not
party to the
act, where
an enacting
clause in
the statute
expressly
exonerated
the lands
from tithes.
*[1388]

That by an act passed 13 G. 3. entitled, “ An act for dividing and inclosing certain moors, commons, or tracts of waste lands, within the parish and manor of *Lanchester*,” it was enacted, that the commissioners therein named should, after setting out thirty acres of the said land to the curate of *Latley*, and other portions of land for the purposes therein mentioned, let out the residue of the said land (except so much thereof as was therein-after directed to be *sold for defraying the expences of obtaining the said act, and other purposes therein mentioned), unto and amongst the bishop of *Durham*, who was the lord of the said manor, and the several other persons having rights of common thereon, according to the value of their respective estates to which such respective rights of common belonged; and that all such lands as should be allotted to any persons in respect of their respective lands and tenements, should be held by them in the same manner as their respective messuages, &c. in right of which such allotments were holden respectively, and subject to the payment of the same species of tithes only, in the same manner, and to the same persons, as they were accustomed to pay.

And it was by the same act declared, that the said commissioners might sell so much of the said moors or commons, as they should think fit, to raise money to pay the expences attending the obtaining and executing the act, and the expence of dividing the said moors and commons, and the expence of setting out and making public highways, roads, bridges, and drains, appointed by the act to be set out, and the expence of inclosing and fencing the allotments, before directed to be made, to the curate of *Latley*; “ and it was by the said act declared, that the persons, who should become the *purchasers* of the said lands so to be sold, *should hold the same discharged from the payment of all manner of tithes*, and other estates, rights, and duties whatsoever to any person or persons politic or corporate.”

And in the said act was a clause in the words following: “ Saving always to the king’s most excellent majesty, his heirs and successors, and to all and every person and persons, bodies politic and corporate, his, her, and their heirs, successors, executors, and administrators, (other than the lord of the manor of *Lanchester* aforesaid, and all other persons entitled to any right of common in or upon the said moors or commons, his, her, and their heirs, suc-

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cessors, executors, or administrators, respectively; and the person or persons, bodies politic and corporate, his, her, and their heirs, successors, executors, and administrators, who shall, by virtue of this act, make any claim affecting the boundaries of the said moors or commons, or any claim of any right of common thereon, which shall be adjudged and determined against him, her, or them, as aforesaid), all such right, title, and interest, as they, every, or any of them had or enjoyed of, in, to, or out of the said moors or commons hereby directed to be divided and inclosed as aforesaid, [1389] or could, might, or ought to have had or enjoyed in case this act had not been made.

“ And be it further enacted, that this act shall be deemed and taken to be a *public* act, and shall be judicially taken notice of as such, by all judges and justices, and other persons whomsoever, without specially pleading the same.”

The bill then stated, that the commissioners caused twelve plots of land to be sold to raise money for defraying the expences mentioned in the bill; that the purchasers immediately improved their lands and converted them into arable ground; that the plaintiff, to prevent any doubt which might arise, whether the said lands were to be considered as barren land, and, as such, exempt from the payment of tithes during seven years, had not during that time required any tithes to be paid to him.

That the defendants had, during the years 1784, 5, 6, 7, & 8, been the occupiers of the lands which had been so sold, and had grown upon the said lands great quantities of wheat, rye, barley, and other grain.

The bill therefore required a discovery from the defendants of the tithes which had arisen during those years on the lands in their respective occupations, and it prayed an account of such tithes, and that the defendants might be decreed to pay the amount thereof to the plaintiff.

To this bill the defendants demurred, for that it appeared by the bill, that the lands which were in the defendants occupation were freed and discharged from the payment of all manner of tithes by the said act of the 13 G. 3.

Upon the demurrer coming on to be argued on the 25th *February* 1790, in the absence of *Perryn B.* and *Thompson B.* the *Lord Chief Baron* said, that it was a question of great importance to the public, and he wished it should be spoken to again when the court was full.

On the 7th of *May* 1790 it was re-argued.

Burton and *Abbot* for the defendants insisted, 1st, that the plaintiff's right as impropriator was not saved by the saving clause in the act: that it was clear his right was not saved by the words of that

clause, 'because it saves only rights of, in, to, or out of the moors of commons; and a right to tithes is not a right of, in, to, or out of land, but is a right to something collateral to the land. "Tithes are an ecclesiastical inheritance, collateral to the estate of the lands, and of their proper nature, due only to an ecclesiastical person by the ecclesiastical law." 11 Co. 13. *b. Parkins v. Hinde*, Cro. Eliz. 161. *Bp. of Lincoln v. Cooper*, Cro. Eliz. 216. *Watson's Clerg. Law*. 402. c. 47. 1 Leon. 333.

1793.

Riddle
v.
White.

[1390]
Supra 161.
Supra 163.

2d, That the impropiator's right not only was not saved by the words of the saving clause, but that it did not appear to be the intention of the legislature to save it; because it was highly reasonable that the impropiator, who derived great benefit from this act, by which the lands out of which the tithes arose were rendered much more profitable than they were before, should bear his proportion of the expence of the act being passed: that by the lands which were sold to raise money for paying the expence of the act being exempted from tithes, the impropiator bore his just proportion of the expence, but nothing more.

3d, That if, however, the words of the saving clause did extend to the impropiator, and it could be supposed that a legislature intended by that clause to save his right; yet, the clause was void, because it was repugnant to the body of the act, which expressly declares, that the lands to be sold shall be discharged from the payment of tithes: that the decisions of courts of justice with respect to private acts of parliament were exactly the same as with respect to deeds, and in a grant every exception which is repugnant to the grant itself, is void, *Shep. Touchst.* 78: that this however was a public act, and every clause in an act of parliament, repugnant to the body of the act is void, 19 *Vin. Abr.* 531. *Jenkins* 196. pl. 4. *Alton Woods*, 1 Co. 47. and the cases there cited, *Hyde v. Upton Dy.* 150. 6. *Benlow* 89.

4th, That it would be very hard on the defendants, if they were compelled to pay tithes for lands which they had purchased upon the faith of an act of parliament, declaring that they were discharged of tithes.

The Solicitor General, Mitford, and Romilly, for the plaintiff contended, that this act of parliament, was to be considered as a public act only for the purpose of being judicially taken notice of by the judges without being specially pleaded, and for no other purpose whatever: that this kind of acts, though declared for the special purpose mentioned in them to be public acts, are never kept in the parliament rolls, are never printed among the statutes, and do not receive the royal assent in the same words by which public acts receive it, "*le roi le veut*;" but in the words by which private acts receive the royal assent "*soit fait comme il est désiré*:"

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v.

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[1891]

that they were in fact to be considered as parliamentary conveyances, not as public statutes, which concern all the king's subjects.

That the saving clause was not void, though it was repugnant to the body of the act; because it was of the very nature of a saving clause, that it should be repugnant to the body of the act, the object of it being to control every thing in the act, as far as it affected the interest of persons not parties to it: that if saving clauses were not to be so considered, they were useless; because, if the rights of parties were not expressly disposed of by the act, they would be saved to them, even though there were no saving clause; as, if here the act had not declared that the lands should be discharged of tithes, the impropiator would have been entitled to tithes, though there had been no saving clause. A saving clause may have an operation, though not expressly repugnant to the body of the act; as, if it had been declared in this case that the lands should be held free from all charges without mentioning tithes, and then there had been a clause saving the right of the impropiator. The case of the *Prior of Carthouse and the Dean of St. Stephen's and Boswell's case* both cited 8 Co. 138. a. in *Sir Francis Barrington's case*, et dict' per Hale Ch. J. in *Lucy v. Levington*, 1 Vent. 176. and *Godb. 170. S. P. Attorney General v. Governor & Co. of Chelsea Water-works, Fitzg. 195.*

That the cases of grants were totally unlike the present; for the reason why an exception contrary to the words of a grant is void is, because the words of a grant are to be taken strongly against the grantor, 10 Co. 106. b. That private acts of parliament were, in some respects, considered as deeds, but not as to the present point; for that would be to consider how a deed is to be construed as against a person not a party to it.

That the words used in the saving clause were intended to be the most general so as to extend to all persons not parties to it: that it is impossible to suppose that the legislature meant to preserve only rights of a particular description, and not rights of every kind; and if it had intended to except the impropiator, he would have been excepted expressly together with other excepted persons. In an act passed 19 G. 3. with respect to a small part of the lands inclosed by this act, the impropiator is expressly excepted, notwithstanding that the only rights saved by the saving clause are rights of, in, to, or out of the piece of land mentioned in the act; which shews clearly that the legislature thought these words would [1892] save the impropiator's right, without an express exception to the contrary.

That in fact, there was no injustice in the impropiator taking the benefit of the inclosure without bearing any part of the ex-

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pence of it; because, by law, a rector is entitled to a tithe of the clear profit of the land without paying any part of the expence of its improvement and cultivation; and the expence of inclosure is only an expence necessary to its improvement. That, however, the impropiator contributed to the improvement in the way in which alone the law has said that a rector shall contribute; that is, by abstaining according to the stat. of *Ed. 6.* from demanding any tithes from these lands for seven years after they had been improved.

That it appeared too, that the money to be raised by sale of the lands was to be applied, not only in paying the expence of obtaining the act; but in making roads, and in making an allotment to the curate of *Latley*, from which the impropiator could not possibly derive any benefit.

That if, however, there should be any injustice in this particular case, it should be considered how much greater injustice would be done by suffering the rights of persons to be disposed of in their absence and without their consent, under the pretence of its being for their benefit.

That as to the hardship on the defendants, they ought to have seen that the right of the impropiator was saved by the act of parliament; and it is their own negligence, if they have purchased under an imperfect title.

Burton, in reply, said, that this act could not be considered as a parliamentary conveyance, it being that which related to the general improvement of the country; and that though a rector was not to bear any share of the expence of improving barren land, but merely to abstain from taking his tithes for seven years; yet, he ought to bear a part of the expence of obtaining an act for inclosing lands, that being an expence in addition to the common and necessary expence of improving barren land.

The court deferred giving judgement in this case, and in the meantime the Lord Chief Baron *Eyre* having been removed to the Court of Common Pleas, and having been succeeded in this court by sir *Archibald M'Donald*, the case was re-argued on the 14th and 15th of June 1793.

Burton and *Abbot*, for the defendants, contended, 1st, that the right of the plaintiff was not saved by the words of the saving [1393] clause. 2d, That, if the plaintiff's right was saved by the strict letter of the clause; yet, that considering the spirit of the act, and what must have been the intention of the legislature, the plaintiff's right was not saved; because they must have intended that the impropiator, who was to derive such advantage from this act of parliament, should contribute his share of the expence of it. And 3d, That if the plaintiff's right was saved by the letter and spirit of the clause, yet, that that clause could have no operation, because it

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was repugnant to the body of the act, and therefore void; and they cited the authorities which had been before cited, and the case of *Ward v. Cecil*, 2 Vern. 711.

The Solicitor General, *Mitford*, and *Romilly*, argued, 1st, That this was within the letter of the clause for the same reasons as were urged upon the former argument. 2d, That the plaintiff's right was saved according to the spirit of the act: that if the plaintiff's right was not saved, the parliament had deprived him of a very valuable right without any compensation whatever; and it could not be presumed that they meant to do such injustice. That even if the rector ought to bear his share of the expence of passing the act, and making the improvements, which by law he certainly ought not to bear, it would not justify the present act; because the lands, which by the act were to be sold discharged of tithes, were to be sold to raise money, not merely to pay for passing the act and making the inclosure, but for several other purposes, from which the impropiator could not possibly derive any advantage; as, to set out land to augment the curacy of *Latley*; to defray the expence of defending the commoners rights of common; to pay the expence of making highways, and of inclosing and erecting buildings on a certain quantity of land, which by the act was to be vested in the justices of the county, and which was to consist of not less than 300, nor more than 500 acres, and which quantity of land the act afterwards declared should for ever after be discharged from the payment of tithes, and should be let by the justices to raise a fund for repairing the highways; so that by this act the impropiator was to contribute to the expence of inclosing and building upon land from which he was never afterwards to receive tithes: that though the commissioners had sold only 1630 acres of land, they had an unlimited power to sell any quantity that they pleased; and if they sold too much, the surplus money was to be distributed among the persons having a right of common, in pro-

[1394] portion to the yearly value of their estates: but no provision was made for returning any part to the impropiator, so that if the impropiator's right was not saved the commissioners had a power of selling all the lands discharged of tithes, and distributing the purchase money among the commoners; that the act of the 19 G. 3. mentioned on the former argument, related to the land, which by this act was vested in the justices, and in the saving clause in that act the impropiator's right is expressly excepted: that the two acts, therefore, being taken together, the case stands thus: the legislature has declared, that two parcels of land shall be sold, and shall in the hands of the purchasers be discharged from tithes, and has saved the right of all persons not parties to the act in both parcels of land: but, with respect to one parcel of land, it has ex-

pressly and by name excepted the impropiator's right, and it has not excepted his right with respect to the other; whence it must be inferred, that the legislature intended to save his right where it has not expressly excepted it. That as to the proposition, that a clause in an act of parliament repugnant to the body of the act, is void, it might be understood in two ways; either that a clause which was repugnant to the whole purview of the act, and which was such, that if it had any operation the act must be a nullity, was void; in which sense the proposition had no application to the present case; or, it might be understood that a clause repugnant to any provision or any expression in the act, was void: but in that sense of the proposition there was no authority to support it, unless it were the case in *2 Vern.* which was very loosely reported; and in which it did not appear whether all the creditors were not parties to the act: that the cases cited in *1 Co. 47.* were there inaccurately cited; particularly the cases in *Dyer 231.* and *Bro. Parl. 77.* neither of those cases having been decided on the ground that the saving clause was repugnant to the body of the act. That it was true, that this act was to be considered as a parliamentary conveyance, and to be construed as a deed; but it was to be so construed as between the parties; and like all other deeds it could not affect the rights of persons who were not parties to it. That to say, that the defendants had purchased upon the faith of an act of parliament was begging the question: it was only, if the defendants were right in their present argument, that they had purchased upon the faith of an act of parliament: if the plaintiff was right, they had purchased not upon the faith, but upon a misconstruction of the act of parliament; the defendants ought to have seen who were the parties to the act; and there could be no difficulty as to that, because the persons excepted in the saving clause [1396] are the only parties to a private act of parliament. That the court must put exactly the same construction upon this act now, as they would have done immediately after it had passed, and before the lands had been sold.

Burton in reply insisted, that a saving clause which was directly repugnant to any express provision in an act of parliament was as much void, as if it were repugnant to the whole purview of the act; and he put the case of an act relating to all the manors in a county, saving the manor of *A.* which he said would be good; but, if it related to the manors of *A. B. C.* and *D.* by name, saving the right of *A.* he insisted that it would be as clearly void, as if it had likewise saved the rights of *B. C.* and *D.*

6th July 1793. — The court this day gave judgement.

Lord Chief Baron. — Without going into an elaborate argument upon this case; it is sufficient to say, that it seems to fall within

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all the principles of a contradiction between a saving and enacting clause in an act of parliament; and that the case is exactly the same as that of the duke of *Norfolk*, as *Alton Wood's* case, and the case in *Vernon*. The legislature takes upon itself to alter entirely the mode of tithing all the lands which are to be the subject of the inclosure. It is impossible to say that the rector is entitled to his tithes of the land in question, without saying that he would have it in his power to defeat all the purposes of the act; which the legislature never could intend. This case is in point of principle precisely the same as the case in *Vernon*. In private acts in general, the legislature does nothing more than enable persons to enter into a contract who could not otherwise enter into it, and the persons who are parties to the act are expressly named in it: but here the legislature does a great deal more; it takes on itself to act on the land itself, to declare that it shall be discharged of tithes. According therefore to the principle of the decided cases, and indeed of common sense, we think that the rector cannot claim his tithes against the express words of the act of parliament, and that the demurrer must be allowed. (a)

[1396]

Tr. 33 Geo. III. A.D. 1793. Scac.

Dean and Chapter of Bristol v. Donnessthorpe. [1 Anstr. 272.]

S.C.

4 Wood's
Decr. 381.

The answer insisting on a *modus*, a motion to pay up the arrears of the *modus*, and the plaintiff to proceed at his peril, was refused, for that is only done where the very thing demanded is offered. But the court afterwards considered the tender in the costs.

THIS was a suit for tithes. — The defendant set up a *modus*, but had not paid it; and therefore moved, after answer, to be allowed to pay to the plaintiff the arrearages of the *modus*, with costs of the suit up to that time, and the plaintiff to proceed further at his peril. The rule was refused by the court, on the ground that such a tender is never allowed, except where the defendant offers to pay the thing demanded, that is, the value of the tithes themselves; and not where he tenders a less sum to make good the bar he sets up against the demand. The court, however, then said that they would consider the offer afterwards in the costs, if the plaintiff should proceed. He did proceed; had an issue directed, and abandoned it. The *modus* was therefore taken *pro confesso*; and the costs up to the time of the former offer were directed to be paid by the defendant; since that time, by the plaintiff, without opposition.

(a) Lord C. B. *Eyre* upon the first argument said, "I am satisfied that the letter of this clause is against the plaintiff. But it is of prodigious consequence to give such a sense to the clause as

shall bar persons not parties to the act; and I by no means agree, that the general enacting clause in such act is void, because repugnant to the body of the act

Tr. 33 Geo. III. A.D. 1793. Scac.

Wake v. Russ. [1 Anstr. 295.]

BILL for account of tithes of milk. — The answer insisted upon a *modus* in lieu of tithe-milk, to pay every tenth day's cheese during the space of twenty weeks; the first cheese to be paid on fifteen days after *Holyrood-day*. The evidence was principally a terrier 1677, in which there were two entries; the first was "Every tenth day's cheese for twenty weeks;" the second entry at the end of the terrier was, "Every tenth day's skimmed milk cheese; the first to begin in fifteen days after *Holyrood-day*, and to continue till twenty weeks are expired after *Holyrood-day*." There was evidence of the rector having at one time received a composition of one shilling for every milch cow; no proof was offered of tithe-milk being ever paid; few cheeses had been paid within memory.

Burton and *Richards*, in support of the *modus*, offered evidence of payment of a tithe-cheese to a person in the house of the tithe-gatherer, who took it in. *Per Cur.* The tithe-gatherer's authority is personal; the act of any other person, not authorized by the clergyman, cannot bind his right.

Plumer and *Short* contended that a *modus* of every tenth day's cheese was void for the uncertainty; for it is not said that one whole day's milk shall go to it; and so not like the case 1 *Roll. Abr.* 651. *pl.* 19. cited.

Per Cur. — The proof of the *modus* in the terrier is contradictory and uncertain; and on the other hand, there is no evidence of perception of tithe of milk in kind, and the terrier which is signed by the rector seems to imply a *modus* of some kind; all we can do is to direct an issue.

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4 Wood's

Decr. 404.

A *modus* of every tenth day's cheese during 20 weeks from *Holyrood-day*, in lieu of tithe of milk, is good.

Semb. Proof of delivery of a cheese at the house of the tithe-gatherer, but not to himself, cannot be admitted to prove perception of the *modus*.

*[1397]

M. 34 Geo. III. A. D. 1793. Scac.

Sawbridge Clerk v. Benton. [2 Anstr. 372.]

THE plaintiff, rector of *Thundersley* in *Essex*, brought his bill for an account of tithes of lands there in the possession of the defendant.

The defendant claimed to be discharged of tithes, under a composition real of 20s. for all tithes arising in *Thundersley Park*, of which the premises in question composed the greater part; the whole park being 360 acres, of which the defendant was in possession of 292.

The patronage of the church of *Thundersley* (together with a pension of 24s. out of the profits thereof) was formerly in the priory of *Prittlewell*; which was an alien *French* priory; and, as such,

S. C.

4 Wood's

Decr. 407.

The consent of the ordinary to composition real may be presumed from length of time. A composition of 20s.

yearly out of the profits of *T. Manor*, in

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lieu of
tithes of
T. Park, is
good.

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its claim to present to the rectory devolved to the king during his French wars; and king Ed. 3. did on that ground present to this living from 1328 till 1362. The priory afterwards presented till 1408. In May 1374 that king granted letters of denization to the priory; on the 6th of July in the same year letters patent were granted by that king to the rector, which were now insisted upon as proof of a composition having then taken place; the existence of these letters patent was proved by an *inspeximus* granted to the rector, upon his request, in the 24 H. 8. notifying that letters patent had been granted by Ed. 3. in these words: “*Edwardus Dei gratiâ, &c. Sciatis quod nos de gratiâ nostrâ speciali et in recompensionem decimarum quas persona ecclesiæ de Thundersle in Com. Essex solebat percipere tanquam pertinentes eidem ecclesiæ de terris quas infra parcum nostrum de Thundersle fecimus includi concessimus pro nobis et hæredibus nostris eidem personæ viginti solidos percipiendos singulis annis sibi et successoribus suis a die quo terræ prædictæ primo inclusæ fuerunt infra parcum nostrum prædictum in perpetuum ad terminos Paschæ et St. Michaelis per equales portiones de exitibus manerii nostri de Thundersle per manus ballivorum præpositorum sive firmariorum ejusdem manerii qui pro tempore fuerint. In cuius rei testimonium, &c.*” The park was separated from the manor by a grant 1547, and the manor granted to another person in 7 Ed. 6. 1553, and they have continued separated ever since. King H. 8. was not patron at the time of granting the *inspeximus*. The 20s. had always been paid and received till the grant of the manor in 7 Ed. 6. but never afterwards; and no tithe in kind had ever within memory been paid for the park.

Burton and *Graham*, for the defendant, insisted that king Ed. 3. had acted as patron, the priory being alien, and being also supreme ordinary; his letters patent were, when accepted, an agreement of all necessary parties. Although the right as supreme ordinary is not now held good, yet formerly it was; and there is no instance in ancient times of grants by the kings, or compositions entered into by them, being sanctioned by the consent of the bishop.

But supposing him only to act as proprietor of the land, yet after so long acquiescence, all solemnities and consent of parties are to be presumed. The consent of the patron and bishop may have been by some other instrument, the existence of which the court will presume at such a distance of time as the rule is laid down as to all deeds and grants by *Buller* Justice, in *Read v. Brookman*, 3 Term Rep. 151. The consent of the parson, and the ampleness of the recompence, appear from his successor in 20 H. 8. having been solicitous to obtain the *inspeximus* in confirmation of his right. Although a composition real differs from a *modus* in this, that having its commencement within time of memory, such commence-

ment must be shewn, yet the actual deeds under which the composition took place need not be shewn.

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If there is any doubt on the validity of the composition, at least the court must grant an issue to ascertain the fact.

Plumer and Fonblanque for the plaintiff.—The king having granted letters of denization in *May 1374*, could not treat the priory as alien enemies, and consider himself therefore as patron in *July* following. The idea of the king's being the supreme ordinary, and acting as such, is contrary to the old, as well as the present doctrine; *Co. Litt.* 96. a. 344. a. 2 *Inst.* 398. And without the consent of [1399] the patron and ordinary, the composition was a mere agreement between the crown and the rector, as the letters patent purport to be; and not a binding composition. A *modus* presumes the consent of all parties, but in a composition real it must be shewn. *Chapman v. Monson*, 2 *P. Wms.* 573. *S. C.* 1 *Eq. Ca. Abr.* 367. *Supra* 679. *Fitzg.* 119. where it is said that in a *modus* such consent is presumed, as being necessary to make the composition binding. Though the doctrine of the production of deeds has been relaxed, yet evidence of a composition having actually existed is still required; *Bury Saint Edmunds and Wright v. Evans*, *Com. R.* 643, where the court lays down the principle expressly, that a composition real is not to be presumed; and *Ekin v. Pigot*, 3 *Atk.* 298. *Supra* 757. *Supra* 783.

If presumption from long acquiescence were allowed to support a composition real, a payment too rank for a *modus* would be evidence of a composition: but in *Robinson v. Appleton*, at *Serjeants Inn*, 22d February 1777, where, on a composition real being set up, all the evidence went to prove a *modus*, it was rejected by this court as not leading to a presumption of any actual agreement within time of memory. So *Smith v. Goddard*, 1777. *Supra* 1101. *Supra* 1122.

Here the payment is to be made from the profits of the manor, not of the park. Suppose the payments had in fact been always made by the owner of the rest of the manor, the argument from presumption goes the length of proving that the tenants might, from mere non-payment of tithes, set up a right *de non decimando*. And in all cases of a prescription *de non decimando* claimed, the court might equally well presume a rent or lands to have formerly been given, as a composition for the tithes. But the letters patent set up a composition void upon the face of it; the payment is not to be from the manor or park, but from the profits of the manor. There may be no profits, and the composition is therefore void for the precariousness of the recompence. It seems to be a mere voluntary grant from the bounty of the king, in recompence of the tithes the parson had lost by the inclosure of the park about ten years before. And it is material that the subsequent grants and conveyances of the manor, take no notice of this as a charge upon.

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Benton. it; and there was no payment of the 20s. after the year 1547, when the park went into other hands. This is a question of mere law, and therefore the court ought not to direct an issue, as the general inclination of juries to decide against the claim of tithes, would not leave the plaintiff a fair prospect of justice.

[1400] *Macdonald*, Chief Baron, this day, viz. 15th December, delivered the opinion of the court. After stating the case —

The plaintiff, the rector of the parish, rests upon his common law right of tithes, and accordingly the *onus* of proving something contrary to that right is thrown upon the defendant. To establish a composition real, he has not been able to produce the deeds executed by the parties at the time, but has shewn evidence from which it may be inferred that such deeds did once exist. The grant from *Ed. 3.* is not now extant, but is proved to have existed from the letters patent of *H. 8.* It is also proved, that that grant was followed by acts of parliament, and by writs out of this court, to pay up the arrearages to the rector. The stoppage of payments after 1547, is naturally accounted for: upon the dissolution of the monastery, the king in their right became entitled to the pension of 24s. yearly, and therefore the rector would not call for an account where the balance was against him. Then the question is, whether there is here sufficient evidence for the court to presume that a composition for the tithes in question took place upon a solid and legal foundation.

In the 20 *H. 8.* the rector claimed an *inspeximus* to confirm the former grant; this proves the composition to have been then advantageous to him. It was an application by a simple individual for mere justice against the crown, and we must presume, that he did not succeed in that application, without fully proving the right. We have here then two of the necessary parties to a composition real.

It is also highly probable that the king either was patron at the time, or took upon himself to act as such; the priory being alien, their right of patronage devolved to the crown during war with *France*. It is not clear whether the two countries were not at that time in a state of war, the historians differing as to the exact time of the pacification; but we rather incline to think that a war then actually existed, as stated by *Rapin*; and certainly a war had existed a very short time before. It is natural and probable to suppose that the temporalities of the alien priory were not immediately restored; the more so, because it is in evidence that the king did, about the same time, present to another living, of which the patronage was also in this priory. Here then is the consent of another necessary party to the composition; and it is no objection to say, that the consent of all the parties is not by the same deed. That is by no

means necessary; and in the case of the king, who consents by letters patent, it never can take place.

*The production of the deeds by which all the parties consented, is not necessary. In the case of the crown itself, letters patent have often been presumed from length of time. *Cowp.* 109. So in *Bedle v. Beard*, 12 Co. 4. a grant of the king was presumed an order to support an ancient impropriation; and lord *Ellesmere*, admitting the objections to the apparent title, yet held that after long possession the title should be presumed. So very unwilling was that great judge *quieta movere*. So the case of *Grimes v. Smith*, 12 Co. 4. in establishing an endowment of a vicarage. Common recoveries are often supported, though the right of the tenant to the *præcipe* does not appear. 1 *Vent.* 257. 2 *Str.* 1129. and the case of *Hasselden v. Bradney*, cited by *Buller J.* 3 *Term Rep.* 159.

How the consent of the ordinary was applied does not so immediately appear. It has been argued that the king had acted as supreme ordinary also upon this occasion, and that is the more probable, because it is certain that the pope very often did usurp the place of the particular ordinary, and was considered as having a right so to do, from his supreme authority, being styled the apostle.

But by whomsoever the consent of the ordinary had been given, we are now bound, after so long a time, to presume *omnia solemniter esse acta*, according to the decisions I have already cited; and as a legal foundation for this claim must have been proved in the application in the time of *H. 8.*, the granting of the *insperimus* in that case is an admission and ratification of it.

The rector here stands in a very unfavourable point of view; he comes here to disturb the quiet of the parish, after an acquiescence of 400 years by his predecessors, and of thirty-three years by himself, in the exemption now established against him. The bill must be dismissed with costs.

H. 34 Geo. III. A.D. 1794. Scac.

Dryden and others v. Robinson and Brown. [MS.]

THE bill stated, that the plaintiffs were tenants holding under *Robinson* from year to year, with an agreement that their lands should be holden tithe-free: that *Robinson* being then mortgagee of the lands, and sir *J. Pennyman* being entitled, as impropriator, to the tithes; it was also expressly agreed between the plaintiffs and *Robinson*, that the plaintiffs should be entitled to the way-going crop; that *Robinson* and sir *J. Pennyman* then conveyed, during the current year, to *Brown*, who was now suing the plaintiffs in the spiritual court for the tithes of this same way-going crop, which

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*[1401]

Supra 221.
332.

Supra 158.

Where the king, *Ed. 3.* entered into a composition real as owner of the land and as patron of the church, he may also be presumed to have taken upon himself to act as supreme ordinary. *Semb.*

Where *A.* lets to *B.* lands tithe-free, with the privilege of having the way-going crop, *B.* has a right to claim [1402] payment or

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reimbursement from A. of the tithes of such crop, if he is sued by the rector.

Demurrer to a bill so praying, and for an injunction to restrain proceedings in the spiritual court over-ruled.

accrued in the subsequent year when the new holding under *Brown* had begun. It expressly charged, that *Robinson* had agreed that the plaintiffs should hold under him tithe free, in consideration of which they paid a higher rent. It charged also that *Brown*, when he purchased, had notice from *Robinson* of this agreement to hold tithe-free, and that therefore he was barred from this demand; and it prayed, that, in case *Brown* should, in the opinion of the court, be entitled to the tithe of the way-going crop, then that *Robinson* might discharge the amount to *Brown*, or reimburse the plaintiffs in case they should have been obliged to pay *Brown*, and for an injunction in the interim.

The defendant, *Robinson*, demurred to the discovery and relief for want of equity in the bill as against this defendant.

Stanley for the demurrer argued, That the plaintiffs, by their own shewing, had not made any title against *Robinson* as to the tithe of the way-going crop, and therefore *Robinson* was not a necessary party to the bill; for though he admitted that *Robinson* was to indemnify the plaintiffs from these rents, yet he contended that the plaintiffs had not shewn any danger of their being compelled to pay *Brown*, and therefore the defendant was not liable to damages upon his agreement; that the defendant *Robinson* has only a collateral interest in the question, and that, in truth, *Brown* being charged to have no merits in his suit for tithes, the equity of the bill wholly failed against *Robinson*.

Abbot for the plaintiffs, and in support of the bill.—This demurrer is no defence in bar of the discovery and relief sought by the present bill. The facts of the bill which the demurrer admit to be true, are, that the plaintiffs being lessees tithe-free under *Robinson*, *Robinson* conveys to *Brown*, and *Brown*, the grantee of *Robinson*, now sues for the tithe of the way-going crop, which, by *Robinson's* agreement, was to pay no tithe. The question is, Whether the lessees may not compel *Robinson*, their original landlord, to indemnify them from the payment of this tithe, as claimed by *Brown*, who is *Robinson's* grantee? Such a bill is in the nature of a bill *quia timet*, and in origin, principle, and precedent, it is applicable to cases like the present.

[1403] This, like many other equitable proceedings, in its origin is founded on old common law-writs, and is introduced for advancing the legal remedy. At law there were six *brevia anticipantia*, called writs *quia timet*, which a party might sue out, though not molested, distressed, or empleaded. See 1 *Inst.* 100. And in equity these suits extended to other cases.

The principle is, to protect a party against demands, by calling on any other party bound to exonerate him, however remote the possibility; and not only where the act to be done is an immediate

money-payment, but also where the exoneration depends on the performance of an agreement.

The precedents are as old as our system of equity. A remainder-man may compel tenant for life of a settled estate, charged with incumbrances, to keep down the interest, though the possibility of his suffering by any arrear is remote. See *Hayes v. Hayes*, per Lord Keeper Finch, 2 Ch. Ca. 223. So, a surety having a counter-bond may compel the principal to discharge the debt, because he shall not always have a cloud hanging over his head. And *a fortiori* where an actual demand by any one of that which the party has agreed shall not be demanded; as, where a covenant is made to indemnify against payment of rent, though there be no allegation that the rent was due, and only an allegation that it was sued for, yet the covenantee may maintain this bill. This is exactly parallel to the present case, and both rest upon the defendant's agreement to exonerate. The course otherwise would be, if, on his *prima facie* title, the impropiator recovered tithes arising upon an occupation during his time, then the present plaintiffs must afterwards sue afresh for reimbursement; and then it would be too late to prevent a payment which the sentence would have already enforced. Therefore, on principle, precedent, and policy, the court ought to direct payment by the party in fault to the party entitled, and not to suffer the innocent tenants or occupiers to be vexed by this demand.

The court were of opinion, that the demurrer could not be supported, because the plaintiffs had a clear right to be indemnified by *Robinson* in case *Brown* succeeded, which would not be known till the event of *Brown's* demand appeared in the spiritual court.

Demurrer over-ruled.

On the coming in of *Brown's* answer in May 1794, he moved to dissolve the injunction; but the court continued it to the hearing.

H. 34 Geo. III. A.D. 1794. In Canc.

[1404]

Coggan v. Lord Lonsdale. [MS.]

THE plaintiff, as being seised in fee of the impropriate rectory of *Laleham*, filed his bill against the defendant for an account of tithes of hay and clover arising on lands occupied by him within the parish; and the bill alleged that *Alexander Cromleholme*, who was vicar of the parish of *Staines*, and was made a defendant to the bill, claimed to be entitled to the tithes of hay and clover arising within the parish, and that the defendant, Lord *Lonsdale*, pretended that there was some *modus* payable in lieu of the tithes of hay and clover within the parish; and it required the defendant to set forth (if he set up any *modus*), to whom the *modus* was payable, and also to set forth what lands he pretended were covered by it.

Exceptions to an answer, because it did not set forth to whom a *modus* insisted on by the defendant as a parochial *modus* was payable, and what particular lands in the

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Lonsdale.*

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defendant's
occupation
were cover-
ed by it
allowed.

The defendant, Lord *Lonsdale*, by his answer said, that he had heard and believed, that from time immemorial there had been a certain ancient and laudable custom used and improved within the parish, that all the occupiers of land within the parish had paid, and of right ought to pay at *Michaelmas* yearly the sum of *2d. per acre* for every acre of meadow land so occupied by them within the parish, in lieu of the tithes of hay and grass arising within the parish; and the answer stated, that the defendants had not had any clover during the time mentioned in the bill.

To this answer the plaintiff excepted; 1st, For that the defendant had not set forth *to whom* any *modus*, composition, rent, or yearly sum of money had been paid or payable in lieu of the tithes of hay and clover; 2d, For that the defendant had not set forth for what particular lands, by name, descriptions, and quantities, he set up any exemption or discharge from the payment of tithes, and particularly the tithe of hay.

These exceptions were allowed by the Master; and his report being excepted to, they now came on to be argued.

[1405] In support of the exceptions to the report, *Graham* and *Abbot* argued; 1st, That a defendant could not be compelled to say *to whom* a *modus*, which he set up, was payable; that a plaintiff was not entitled to compel a defendant to state a *modus* more particularly than he chose to do. If the *modus*, as stated in the answer, was not stated with sufficient certainty, it could not be established, and the court would not direct an issue upon it; but yet the plaintiff had not a right to compel the defendant to state his *modus* more particularly than he chose to do. That in fact one considerable question in this cause was, Whether the plaintiff as rector of *Laleham*, or the defendant *Cromleholme*, as vicar of *Staines*, was entitled to the tithe of hay and clover in the parish of *Laleham*? That that was a question quite distinct from the question, whether a *modus* were payable in lieu of tithes, whoever might be the persons entitled to the tithes; and to compel the defendant in stating the *modus* to say whether it was payable to the vicar of *Staines* or the rector of *Laleham*, was to compel him to take upon himself to decide the question between the rector and the vicar, though it was a question with which he had nothing to do; that the *modus* had in fact been paid to the person (whoever he was) who, for the time being, had been in the receipt of the tithes; and to compel the defendant to state the *modus* as payable either to the rector or the vicar, was to shut him out from all the evidence which he might be possessed of, of payments in respect of the *modus* made to the other person. With respect to the other exception it was said, that as the *modus* was laid as a parochial *modus*, it was impossible for the defendant to set out particularly what lands were covered by it; all

the lands in the parish were covered by it, when they produced *hay*.

1794.

Coggan
v.
Lord
Lonsdale.

On the other side, the Attorney General and *Allcock* argued, and the Lord Chancellor was of opinion that the answer was insufficient; consequently, that the master had done right in reporting it as insufficient; and that both of the exceptions to his report ought to be over-ruled. With respect to the first exception, the defendant was certainly able to say, and ought to be made to say, *to whom* the *modus* had in fact been paid. And with respect to the other exception, the defendant might, and therefore ought to set forth the particulars of his own lands, which he pretended were covered by the *modus* he insisted upon, although he had insisted on it as a *modus* extending to all lands within the parish. Exceptions to the report over-ruled. (a)

H. 34 Geo. III. A.D. 1794. Scac.

[1406]

Atkyns, Clerk, v. *Hatton*, Bart. and others. [2 Anstr. 386.]

THE plaintiff, rector of *St. Michael's* parish in *Longstanton*, brought this bill principally for an account of tithes, and to have a commission to settle the boundaries of the parish and the glebe. As to a farm of 900 acres of sheep-walk, called *Bourgoyne's Flock*, the defendants set up a *modus* of 40s. in lieu of the tithes of wool and lamb.

S.C.
4 Wood's
Decr. 410.
A commis-
sion to set-
tle the
boundaries
of a manor,
or of a pa-
rish,

ought not to be granted by a court of equity, where the interests of all parties who may probably be concerned is not before the court.

To disprove this *modus*, the plaintiff offered in evidence a paper purporting to be a terrier of this parish, found in the charter-chest of *Trinity College* in *Cambridge*, who were landholders in the parish.

A terrier
cannot be
received in
evidence,
unless it
comes from
the proper
repository,
the registry
of the dio-
cese, or a
copy from
the parish
registry, if
the original
cannot be
found.

Burton, for the defendants, objected to this evidence, as not coming from a quarter that could give it authenticity. The proper place is the bishop's register office.

Richards. — The original is always lodged there, but as the register has been inspected and the original cannot be found, the copy becomes evidence. The college is interested to preserve it; and it is not therefore to be considered as in the hands of a stranger, but in a proper repository.

Burton. — The proper repository for the copy is the parish chest. The evidence was rejected. (b)

(a) On the first point, see also *De Whelpdale* v. *Milburn*, 5 Pri. 485. *infra*. On the second, *Gumley* v. *Fontleroy*, Bun. 60. *supra* 628. *Baker* v. *Planner*, Bun. 108. *supra* 631. *Nash* v. *Thorn*, *infra* 1324. *Wright* v. *Southwood*, 5 Pri. 607. *infra*. *Gillibrand* v. *Scotson*, 4 Pri. 267. *infra*.

(b) *Müller* v. *Foster* and another, at *Warwick*,

summer assizes 1794, *ceram* *Macdonald* Chief Baron.

This was an issue directed, by a late inclosing act, to try whether the plaintiff's land was exempt from tithes when in the manurance of the proprietor; the defendants, Mr. *Foster* and ——— one of the prebendaries of *Litchfield*, in right of his prebend, were seized by moieties of the rea-

1794.

Atkyns

v.

Hatton.

A payment set up in an answer as a *modus*, or compositions real, is not bad for the uncertainty.

The counsel for the plaintiff insisted that the exemption set up as a *modus* or composition real, was bad for the uncertainty; but the court held, that as it was stated to have been immemorially paid, there was sufficient certainty for a defence; although, had it been a bill to establish a *modus*, greater accuracy might have been required. (a)

The court thought the *modus* proved, and decreed that the bill should be dismissed as to that part, unless the plaintiff chose to have an issue upon the *modus*.

As a ground for obtaining the commission, the plaintiff shewed, that there are two parishes in *Longstanton*, *St. Michael's*, and *All Saints*; of the former the plaintiff is rector, of the latter the *Hatton* family are impropriators, another defendant vicar, and the *Hatton* family and other defendants are landholders in both parishes. The two parishes were so mixed and confused in their boundaries, as not to be distinguishable; and this confusion had probably been increased by the circumstance of several rectors of *St. Michael's*, the plaintiff's predecessors, having leased their glebe and tithes to the *Hatton* family, who had not kept them quite distinct from their own property; but the defendants sir *Thomas Hatton* and lady *Hatton* appeared to have done every thing in their power to rectify this impropriety, and to have given up either the original possessions of the rectory of *St. Michael's*, or an equivalent in every particular. The witnesses agreed that throughout all the lands that lie confusedly, the mode of tithing each parcel was known and fixed by custom, although in many parts tithes were taken by each rector from land which to all other purposes was considered as lying in the other parish.

The court expressing a doubt whether a commission to settle the boundaries could with propriety be directed;

Graham and *Richards*, for the plaintiff, contended that it was necessary to grant a commission to reach the justice of the case; by the negligence of the *Hatton* family, who ought to have kept the

tory. The plaintiff's counsel offered in evidence a paper purporting to be a terrier of the parish, found in the registry of the dean and chapter, and argued, that as that was the proper repository for the muniments of the prebend, it was admissible. His Lordship mentioned the case of *Atkyns v. Hatton*, as deciding that the proper repository was the bishop's register office; and that, if found elsewhere, it could not be admitted in evidence.

Percival then contended, that as it could not be considered as a terrier, from not being found in the proper repository, it was merely to be treated as an old paper found among the muniments of the prebendary, kept by the chapter as a memorial of his rights, and therefore evidence against him.

Macleod Chief Baron. — A terrier is an instrument well known in the law. By the canons

it is directed that an inquiry shall be from time to time made of the temporal rights of the clergyman in every parish, and returned into the registry of the bishop, the proper guardian of those rights, for his information. That return is called a terrier, and has authenticity from being found in the proper place. Then this paper purporting to be an instrument taken notice of in the law, must stand or fall according as it has the requisites of such instrument to render it authentic. This has not; and therefore cannot be received in any other light: it is a terrier, or nothing.

A new trial has since been granted by the court of King's Bench, upon the ground that this evidence ought to have been received.

(a) See also *Mallett v. Brown*, *supra* 906. *Ward v. Sheppard*, 3 Pri. 634. *infra*.

boundaries distinct, and by the negligence of the parish, whose duty it is by perambulations from time to time to avoid all confusion, *the rights of the plaintiff are become confused. No process at law can do him justice except for the particular spot of ground for which each action may be brought; so the ordinary remedy of an issue can only ascertain whether the particular close mentioned in the issue belongs to the plaintiff or not. A principal ground of the application also is the total want of evidence of our right arising from the confusion introduced by the negligence of the defendants. It is therefore necessary that a further remedy be applied. If we had proved the land to be clearly within our parish, although asserted to be otherwise by the defendants, we should have had a decree; so, if there had been a difference of testimony as to the locality of any particular piece of ground, it is the common practice of a court of Equity to grant an issue to try whether the spot contested is within the parish or not. But it would be absurd to say, that each disputed case may be the subject of an issue; and yet, when both parties admit that the whole bounds are confused, and it is the interest and the right of each to have them settled, a court of Equity cannot grant them relief.

1794.

Athyns

v.

Hutton

[1408]

A commission is granted in equity to save multiplicity of suits; it is a cheaper and more expeditious way of settling the boundaries than any other; and it is not more conclusive in establishing the rights, as to any other purposes, or against any other parties, than an issue would be. No objection therefore as to parties can avail against granting a commission more than against an issue.

It is particularly necessary for the defendants to have a commission; for they set up a *modus* to cover their lands in this parish, and it is essentially necessary to establishing a *modus*, that the land covered by it shall be clearly distinguished, which it cannot be till ascertained by a commission.

In the case of *Allott v. Wilkinson*, 1779, a commission was granted to ascertain the bounds of the parish where confusion had taken place; that indeed was by consent, but it shews that courts of Equity consider themselves to have this power where necessary; for if they had not this jurisdiction, they would not exercise it even by consent.

Although the patron of *St. Michael's* and the parishioners are distantly interested, and not before the court, yet that objection would equally hold against commissions to settle the boundaries of manors, which are frequently granted at the suit of the lords, without making the tenants parties; yet they are interested in respect of the wastes and commons and other privileges.

1794. *Perryn*, Baron. — In *Webb v. Conyers*, 1 Bro. R. 41.(a) Lord Northington refused a commission to settle the boundaries of a manor.

Atkyns
v.
Hutton.

Thompson, Baron. — I remember a case of *Winterton v. Lord Egremont*, where the parties came, by an amicable bill, to settle the bounds of two manors, and lord *Thurlow* refused to entertain jurisdiction.

For the plaintiff was then cited the case of *Rouse v. Barker*, 3 Bro. P. C. 180. where this court refused to ascertain the boundaries of the freeholds and copyholds in a manor; and the House of Lords reversed their decree, and a commission issued for that purpose.

Ainge said, he remembered a case of the bishop of *Durham v. Clavering*, where lord *Thurlow* did grant a commission to ascertain the boundaries of a manor.

Burton and *Simeon*, for the defendants, contended that a commission ought not to issue. A commission, or an issue, may be granted to establish and settle some right claimed against common law, as a customary mode of paying tithes; but, if it were used to try a right to tithes or glebe, it would be to usurp the office of the courts of law.

The plaintiff would not be entitled to an issue without at least raising a doubt of some parcel of glebe, or portion of tithes, being withheld; but here he cannot point out any spot now in the hands of any other person which properly belongs to his rectory; nor can he shew that, upon the whole, he formerly had more than he has now.

The commission could be of little or no service; for even if it were found that some of the land now considered as belonging to all *All Saints* parish, in fact lies in *St. Michael's*, yet, as it is proved that the tithes are taken by a certain and known division of the lands, each rector would continue to take the same tithes, as a portion of tithes in the other parish, which he now takes as being within his own; and this with the more reason, because each now enjoys considerable portions of tithes in the other parish by immemorial custom in the village.

The commission could have no effect beyond the present suit; for the patron of *St. Michael's* not being a party, the rights of the church cannot be bound, as was settled in the case of *Carr v.*

Henton.
Supra 1258.

A commission is a proceeding so contrary to the spirit of the

(a) Properly *Wake v. Conyers*, since reported of granting commissions to settle boundaries are
3 Cox's Ca. Equ. 360. 1 Eden 331., and see collected.
Mr. Eden's note in which the cases on the subject

common law, that it ought never to issue unless upon grounds much more weighty than those now produced. *Rep. Temp. Finch.* 17. 1794.
**ibid.* 239. *Metcalf v. Beckwith*, 2 *P. Wms.* 376. *R. Temp. King.*
 60, 61. *St. Luke's v. St. Leonard's*, 1 *Bro.* 41. and *Webb v. Conyers*,
 there cited. *Bishop of Ely v. Kenrick*, *Bunb.* 322. *Alkyns v. Hatton.* [1410]

In the case 3 *Bro. P. C.* the confusion was fraudulently created to deprive the lord of his fines on admission. *Allot v. Wilkinson* *Supra* 1098.
 was by consent, and after the quantity of the land had been ascertained by an issue. 7 *Bro. P. C.* 518.

Graham, in reply. — The rule as to parties, laid down in *Carr v. Henton*, applies only to the case of a dispute between a rector and vicar, where the bill seeks to establish the right; there the patron must be a party; for the vicar may be unable alone to stand the contest, and the patron is interested in the suit immediately. Here the commission is prayed only collaterally; the rector seeks tithes of certain lands; the defence is, that they are in the other parish. This point also occurred in the case of *Allot v. Wilkinson*. In settling the original dispute between these two claimants of tithes, an issue was directed to try whether *Wilkinson* then had the same quantity of glebe land which he was entitled to. Then *Trinity College* came in and claimed against both 100 acres of glebe land, and a moiety of the rectories of two out of the three parishes now consolidated; a commission issued to ascertain the ancient bounds; the commissioners returned the evidence instead of the fact, and the return was set aside: a *Mr. Nelson* then lodged a claim to another share of the tithes, and it was not till after setting aside the first commission, that the crown, as patron of the vicar, was made a party. This was by consent of the parties; but the present argument would go the length of saying, that those parties could not consent, and that the court had no jurisdiction.

The cases cited against us have all gone upon the propriety of trying the right at law. Here the case states a total want of evidence upon the subject, which makes it impossible for us to establish our right at law; and as the confusion has arisen through the negligence of the defendants, we are entitled to this as the only mode of redress against them.

Macdonald, Chief Baron. — The plaintiff here calls upon the court to grant a commission to ascertain the bounds of the parish, upon the presumption that all the land which should be found within those boundaries would be tithable to him. That is indeed a *prima facie* inference, but by no means conclusive; and there is no instance of the court ever granting a commission in order to attain a remote consequential advantage. It is a jurisdiction which the courts of Equity have always been very cautious of exercising. [1411]
 In the case of *St. Luke's Old-street v. St. Leonard's*, lord *Thurlow*

1794.

Atkyns
v.
Halton.

expressed great doubts as to the decision of the *Mayor of York v. Pilkington*, and concurred in lord *Hardwicke's* first opinion upon that case. The case of *St. Luke's v. St. Leonard's*, of which the note in *Brown* is by no means full, was upon a bill brought by the parish of *St. Luke* to avoid confusion in making their rates, and prayed a commission to fix their boundaries for that purpose: a number of houses had been built upon land formerly waste, and it was doubtful to which parish each part of the waste belonged. Lord *Thurlow* refused to interfere, and observed, that the greatest inconvenience might arise from doing so; for if that commission were granted, and the bounds set out by the commissioners, any other parties, on a different ground of dispute, might equally well claim another commission; these other commissioners might make a different return, and so, instead of settling differences, endless confusion would be created.

The case of *Allott v. Wilkinson* was the case of parishes consolidated for every other purpose except tithes, so that no other person could have an interest in fixing the ancient bounds except those who were before the court.

The case in 3 *Bro. P. C.* 180. *Rouse v. Barker*, is not in point; there it was admitted that lands of the one description had been confused among the others, and it appeared that that confusion was introduced with a fraudulent view. Here there is no proof of the manner of tithing being wrong, although some confusion has arisen by the negligence of both parties in not keeping their rights distinct.

Whether the bounds of the parish correspond to the manner of tithing, is not determined; it rather appears indeed that in some places tithes have been taken by each rector in the parish of the other; but that may well be, by each having a right to portions of tithes there. The parcels of land upon which it has taken place may have been glebe land, or may have been detached pieces belonging to proprietors of farms in the other parish, who would naturally desire to have the whole tithable to the same rector; and the reciprocity of these customary rights to tithes, makes it extremely probable that some agreement for that purpose has formerly taken place, and that the custom is well founded. However, if the plaintiff chooses, he is entitled to an issue to try the right of the defendants to tithes in those parcels of *St. Michael's* parish. The bill must be dismissed with costs, so far as relates to the commission to set out the boundaries.

A commission is also prayed to set out the glebe land. It appears that the plaintiff has a full equivalent for every piece of glebe that ever belonged to the rectory; so that if the exact metes and bounds are unknown, he has already the full effect of a commission:

if they are known, and any part not delivered up to him, his remedy is at common law: he has made no case for our interference. As to this also, the bill must be dismissed with costs.

1794.

Atkyns
v.
Hatton.

H. 34 Geo. III. A. D. 1794. Scac.

Atkyns v. Lord Willoughby De Brooke and others. [2 Anstr. 397.]

THIS was a bill filed by the same plaintiff against others of his parishioners; and as it also prayed a commission to ascertain the boundaries of the parish, for the same purpose, and upon similar grounds to those in the other case, they were both heard before the court gave their decision in either. The bill in this case also, so far as related to the commission, was dismissed with costs.

S. C.
4 Wood's
Decr. 419.
The court
will not de-
cree against
a farm mo-
dus on the
ground of
rankness.
Whether
notice is
necessary
to deter-
mine a
composition
where a
modus is
insisted
upon. If
a modus is
laid in an
answer with
sufficient
certainty to
found a
good de-
fence, it is
enough;
therefore
held pro-
perly laid as
"a modus
or composi-
tion," and
as payable
"from the
owners or
occupiers."
[1413]

The defendants, lord *Willoughby* and his tenant, *Goodcheap*, set up an immemorial payment, due and payable by the owners or occupiers of those lands, by way of *modus* or composition for the small tithes of their land; it consisted of 340 acres, and was stated to be an ancient farm settled by a parliamentary entail on the family of lord *Willoughby* in the 37 H. 8. No evidence was produced of any actual agreement for a composition having been ever made. The existence of the payment, as far back as could be traced was clearly proved. Sir *Thomas Hatton*, lessee of the rectory under the plaintiff, had received this composition. The plaintiff himself never did, nor did *Goodcheap* the occupier of the farm ever pay it, having come into possession but a few months before the bill was filed. He insisted on the payment, as being at least good as an annual composition, to determine which no notice had been given.

Graham and Richards, for the plaintiff, contended, that this *modus* was not set forth with sufficient certainty: it was pleaded as a *modus* or composition; whereas the claim of exemption set up, being against common right, must be accurately defined.

The payment is said to be due from the owners or occupiers. This leaves the clergyman uncertain to whom he shall resort for the recompence he is to receive for his tithes; each may shift it off upon the other. As a *modus*, this payment is rank. By the survey in *Domesday*, it appears that the two parishes, which consist of about 2000 acres, were then valued at 8 $\frac{1}{2}$ l. This defence set up, supposes, that within 116 years afterwards, at the time of memory, the small tithes of 340 of those acres were valued at 4 $\frac{1}{2}$ l. Of these, the greatest portion, 211 acres, are arable land in the common field, where hardly any small tithes could arise; the other 129 acres are stated to be meadow and pasture land. And it must be maintained that, after deducting all hay-tithe, the other tithes arising from those 129 acres, were compounded for before the time of me-

1794.

Atkyns

v.

Lord

Willoughby
De Brooke.

mory at 4*l.* That would be nearly a fair composition now; but on a moderate calculation, the value of money was then eight times as much as it is now; so that it is equal to a composition for 32*l.* at présent.

If the payment be clearly greater than can be supposed to have been a fair composition before the time of memory, the court will over-rule the claim, without sending it to a trial at law. *Chapman v. Smith**, 2 *Ves.* 514. *Bishop v. Chichester*†, 2 *Bro. R.* 163. *Ekin v. Pigot*‡, 3 *Atk.* 298.

The claim of the tenant to have this considered as an annual composition, totally fails; for it appears that *Goodcheap* never paid this composition; so that it is not a personal contract with him. And it cannot be considered as running with the land, for his landlord, lord *Willoughby*, does not set up such a claim.

The plaintiff never accepted this composition, and therefore any agreements of his predecessors, or of his own lessee, can have no effect to bind him, or to make notice necessary. They are wholly void.

Besides, the tenant as well as his landlord have set up an adverse title, a *modus*, and have therefore agreed to consider themselves as not holding by annual agreement under the rector. Notice is held necessary by analogy to the case of landlord and tenant from year to year; and there, setting up an adverse title is held a waiver of notice to quit possession.

Burton and Steele, for the defendants. — The cases where the court have decided a *modus* to be rank without sending it to a jury, have all been where a *modus* has been set up for a specific thing, as a sheep the price of which is easily ascertainable; for it cannot be supposed, that any man would agree to pay more than the value for every sheep or cow that he or his posterity should ever have on the land. But a farm *modus* is not so easily computed or ascertained; the difference of cultivation may throw more or less of the produce into the small tithes at different times; a landlord, wishing to improve, may have given more than the exact value; or a pious owner may have chosen to settle a considerable annuity out of his land upon the church. In *Chapman v. Smith*, this distinction is taken by Lord *Hardwicke*. So in *Edge v. Oglander*, *Hil. Term* 1691, cited in *Bunb.* 301. a *modus* of 8*l.* for a farm of the value of 80*l.* a year was allowed.

The defendant *Goodcheap* is entitled to the benefit of this composition, being a running contract with the rectors, continued after the plaintiff became rector, and paid to his lessee. That notice was necessary to determine it, notwithstanding the *modus* set up, is decided in the *Kensington* case, *Adams v. Hewit*, 1782, and *Bishop v. Chichester*, 2 *Bro.* 161.

* *Supra*
847.† *Supra*
1316.‡ *Supra*
783.

[1414]

Supra 536.*Supra* 1204.

Graham, in reply. — The *Kensington* case was, where an actual agreement had been entered into between the clergyman and the parishioners, and they insisted on it as a composition during the incumbency. The court held otherwise, that it was only good from year to year, but that notice was necessary to dissolve it; for that was not a denial of the clergyman's right; it was not an adverse claim, but a claim under him for a longer term.

1794:

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v.
Wiltoughby
De Brooke.

Macdonald, Chief Baron. — I believe the question of notice in that case originated with Lord *Mansfield* in the House of Lords; it had not been taken notice of in this court, nor in argument there.

Vide supra
1214.

Graham. — In the case of *Bishop v. Chichester*, the rector, by giving an irregular notice, admitted the necessity of a notice; and probably there had been some agreement between them, or an acceptance of the payment, which supposed an agreement. The law in this respect is expressly founded on the *Kensington* case, Lord *Thurlow* declaring that he decided contrary to what he should have conceived to be the law, as being unable to distinguish it from that case, and bound by it. Then if, in fact, the case of *Bishop v. Chichester* was not distinguishable from the *Kensington* case, it has not carried the rule beyond it, and is to be considered merely as a confirmation of it; if it was distinguishable, then the reason of the decision fails, and it is to be considered as a misapplication of the old rule, not as the adoption of a new one. The present clearly is distinguishable from the *Kensington* case; for here the defence [1415] set up is a *modus*, a title paramount and inconsistent with any agreement or composition with the plaintiff; both parties contending that no agreement exists; then a notice to determine it must be superfluous.

As to rankness; if the arguments relied on are admitted, no *modus* can ever be set aside on this ground; for it is impossible to define how far the benevolence of the former proprietors may have led them in granting beneficial contracts to the clergy. The cases relied upon do not establish any thing like the distinction contended for between farm *moduses* and others. The case of *Chapman v. Smith* went on the peculiar situation of *Romney Marsh*, where the prospect of great improvement by draining might lead the proprietor to agree for more than the existing value. In *Edge v. Oglander*, the *modus* was so large, that the vicar probably agreed to take it as the full value of the tithes, and the decree must then have been by consent, as in *Bates's* case, cited 2 *Ves.* 513.

Supra 645.

Macdonald, Chief Baron. — To the *modus* set up in this case several objections have been taken: first, it has been argued, that it is not laid with sufficient certainty to found a decree; and if this were a bill to establish these *moduses*, that might be the case; but

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v.
Lord
Willoughby
De Brooks.

in an answer, such strictness is not requisite; if it appears that there is a good defence, that is sufficient. The second objection is the rankness of the *modus*, and the court is desired on that ground to over-rule the defence. But it has properly been stated, that a very material difference subsists between a farm-payment and one for a particular species of produce. In the former many reasons may have prevented the tithes from being agreed for at their proper price. The owner may have meant a bounty to the clergyman; or he may have wished to pay for an exemption from tithes for the sake of improvements. Besides, it is hardly possible to ascertain the comparative value of the land, or of the produce, in former times; and the court should not be nice in judging of the value or the goodness of the bargain, where, by any probable circumstances, the *modus* may have been a real agreement between the parties before time of memory. More especially ought the court to be extremely cautious in deciding such a question without the intervention of a jury, if the least doubt arise as to the fact of rankness. * *Edge v. Oglander*, † *Chapman v. Smith*, ‡ *Pole v. Gardiner*, 1 Bro. P.C. 214. Under these circumstances, the court will not decree for the plaintiff, against the *modus* set up; but if the rector desire an issue, undoubtedly he must have it. (a)

* Supra
536.

† Supra
847.

‡ Supra
601.

[1416]

H. 34 Geo. III. A.D. 1794. Scac.

Bousher and others v. Morgan. [2 Anstr. 404.]

S.C.
4 Wood's
Decr. 426.
When a bill
is filed for
an account
of tithes
against one
who had a
lease of his
own and
the other
tithes in the
parish, and
the whole
question in
the cause
turns upon
the validity
of the lease,
and of the
notice given
to deter-
mine it, this
court will
not proceed
till these

THIS bill was brought by the plaintiffs, impropriate rectors of the parish of *Garway* in the county of *Hereford*, for an account of tithes growing on the lands in the possession of the defendant there, and of tithes or compositions for tithes received by the defendant from the other tenants in the parish, as lessee of the tithes under the plaintiffs, the *Berkleys*. The uncle of the defendant had been for many years lessee of these tithes from year to year, and on his death the defendant succeeded him in the possession thereof, and continued tenant till the year 1789, when the plaintiff *Bousher* obtained a lease of the tithes from the *Berkleys* for twenty-one years. *Bousher*, on his becoming tenant, gave the defendant a notice, dated the 25th March 1789, to deliver up the possession of the tithes "at the end of the present year." *Morgan* held the tithes from *Lady-day* to *Lady-day*. After this notice the defendant came with the other farmers, to a meeting called by *Bousher* to settle compositions for tithes; he there heard him agree with the other farmers for their tithes, made no objection, and offered a composition for his own, which was rejected.

(a) On the point of notice, see *Bishop v. Chichester*, 1323. n. where the cases are collected. On the *modus*, in addition to the cases in the text,

see *O'Connor v. Cook*, 6 Ves. 665. 8 Ves. 535. *infra*.

Plumer, Lewis, and Leach, for the plaintiffs, insisted, that the lease to the defendant, being by parol, conveyed nothing, even in the tithes of his own lands, *Cro. Ja.* 137. and the other cases cited in 3 *Bac. Abr.* 337, 338.; but much less, as to the tithes of the other lands, *ibid.*; as to which, the general conclusion drawn in *Bacon* is this: "Herein all the books agree, that if a person lease his tithes, even for a year, to a stranger, it must be in writing, and if it be not, it will be absolutely void;" and as the rent is entire, if the lease is bad in part, it must be bad *in toto*. Even if he had a good lease from year to year, it is determined. The notice is perhaps bad, but the irregularity is waived by the acquiescence of the defendant, in treating for a new composition, and hearing the agreements of the other tenants without making any objection; for by such conduct he has led both the plaintiff and the tenants to make agreements on the faith of his lease being dissolved, and has also prevented the plaintiff from giving a fresh notice, which he might have done if the first notice had not been apparently accepted.

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points are
settled at
law.

Vide 5th
edit. of Ba-
con's Abr.
vol. iv.

p. 54.

Burton and Johnson, contra. — The bill having stated a notice to quit at the end of the then current year, thereby admits the defendant to have been a tenant, and to have required notice; the validity of the demise is not therefore in issue, and cannot be questioned; but a parol agreement for a composition for the lands in the defendant's occupation is good by every day's experience. As to the other tithes, the conclusion drawn in 3 *Bac. Abr.* 339. from all the cases is, that the point is unsettled; and it may be good as between the parties to the agreement, although bad as against the tenants, by its passing no interest. If the notice is bad in part, it is bad in the whole. *Bunb.* 15.

Supra 612.

The notice is not waived; a new agreement or lease would be a virtual surrender of the old one, but a treaty for it is not; and as the plaintiff had manifested a design to determine the lease, it was natural for the defendant to treat for a new agreement when the former should end, without acknowledging that it was then ended.

Here the only dispute is as to title, which ought to be established before the account can be entered upon; and on a disputed title, especially between two laymen, the proper tribunal is a court of law; against a possession for forty years, under this title as tenant, equity will not interfere in the collateral shape of an account.

Plumer in reply. — The bill is for an account, which is the proper jurisdiction of a court of equity. The matter of title is introduced by the defendant's answer, and is not substantiated. The defend-

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ant, by setting up a fictitious claim of title, cannot defeat the plaintiff of his suit.

Macdonald, C.B. — (After stating the case.) — The plaintiff insists that the notice he has given is either originally good, or that the defect is cured by the defendant's having waived the irregularity. Whether it be so or not, is a pure question at law, and not a proper foundation for a suit in this court. So the question whether the lease itself was void or no, is a question proper to be tried in a court of law. These are real questions in the cause, and the account sought is only consequential on the title being established. The court are therefore of opinion that the bill be retained for a year, with liberty for the plaintiff to proceed at law in the mean time for the establishment of his title, as he shall be advised.

[1418]

H. 34 Geo. III. A. D. 1794. Scac.

Brewer v. Hill. [2 Anstr. 413.]

S. C.

4 Wood's
Decr. 429.

Lessee of
tithes
agreed with
the owner
of lands,
for certain
collateral
considera-
tions, not to
take tithes
in kind from
the tenants
of the lands
for twelve
years, but
to accept a
reasonable
composition
not exceed-
ing 3s. 6d.
per acre;
and thereto
bound him-
self and his
assigns.
His under-
lessee sued
(in the
name of a
trustee to
whom he
had nomi-
nally again
under-
leased) for
tithes in
kind against
the tenant
of the land,

THIS was a bill for an account of tithes on the lands in the defendant's possession in the parish of *Hemel Hempstead, Herts.* The plaintiff claimed to be lessee of these tithes under a demise from sir *James Peachey* in the year 1781 to *Thomas Trott* for twenty-one years; *Trott* in 1789 under-leased to *Thomas Patrick* for twelve years; in 1790 *Patrick* demised the same to the plaintiff for five years. The defendant claimed to be discharged from payment of tithes in kind, and set forth an agreement made in 1783 between his lessor of the lands in question, *Christopher Tower*, and *T. Trott*, the then lessee of the tithes, by which *Trott*, in consideration of *Tower's* having demised to him certain other lands, did "for himself, his executors, administrators, and assigns, covenant, promise, and agree, to and with the said *Christopher Tower*, his heirs and assigns, that he the said *Thomas Trott*, his executors, administrators, or assigns, should not, nor would at any time or times during the said term of twelve years take the tithes in kind from any present or future tenant or tenants of him the said *Christopher Tower*, in the said parish of *Hemel Hempstead*, but should and would accept and take of and from all and every the present and future tenant and tenants a reasonable composition for the same, not exceeding 3s. 6d. an acre for the said tithes:" then followed a proviso, that upon non-payment of the composition at each half-year, or within thirty days after, the tithes should be taken in kind. The defendant also proved, that the plaintiff's lease from *Patrick* was only colourable, and that he was to be considered as agent or trustee for *Patrick*. The defendant became tenant to *Tower* of the lands in question in 1790; and claimed to be dis-

charged of payment of great tithes in kind on paying the composition at the rate of 3s. 6d. *per acre*. The tithe of sir *James Peachey* (through whom the plaintiff claimed) to the small tithes, was a demise from the vicar "for all the time the said *Dr. Bingham* should continue vicar."

Plumer and *Grimwood*, for the plaintiff contended, that the plaintiff was not bound by the agreement with *Trott*. The covenant is not, that no tithes shall be demanded, but only that *Trott*, his executors, administrators, or assigns, shall not take such tithes. The plaintiff is not within this description, he is not an assign. The distinction between an assignee and an under-lessee is very strongly marked. *Crusoe on dem. Blencoe v. Bugby*, 3 Wils. 234. *Kinnersley v. Orpe*, Doug. 56. *Holford v. Hatch*, Doug. 174.

This covenant does not run with the tithes, it is merely personal 5 Rep. 16. a. Those covenants only run with the land which are made by the original lessor, not those which his lessee makes. And besides, it is from its nature collateral to the tithes; it is not a demise of part, or an agreement to retain, but merely a covenant to come to a reasonable agreement each year, not exceeding 3s. 6d. *per acre*. Then there can be no privity between the present parties, and the covenant has no force between them.

Even between the original parties it could not operate as a lease of this portion of tithes, for there is no certain rent reserved so as to make it a lease. The same uncertainty makes it void as a covenant, for there must be mutual remedies in a valid covenant; but here the composition being unfixed, *Trott* could demand nothing in certain.

At most it was only a personal covenant between them, which might have been enforced in equity. But as the plaintiff is a *bonâ fide* purchaser for valuable consideration without notice, the equity does not run against him.

Burton and *Allcock* on the other side.—It appears from the statement of the plaintiff's case, that he has not brought the proper parties before the court. *Brewer* holds in trust, as to the greater part or the whole of the tithes, for his nominal lessor, *Patrick*. The *cestui qui trust* must be a party. In a similar case, *Stafford v. The city of London*, 1 P.Wms. 428, the bill was dismissed for want of joining a material party. It appears also, that if the plaintiff succeeds in his demand, the defendant will have his remedy against *Tower*, and he against *Trott*. These, therefore, are material parties to the suit, and ought to have been joined in the bill.

The agreement with *Tower*, in fact, operates as a demise. A covenant with a stranger, that he shall have the tithes, is a lease as much as if it had been of lands; and so if made with the terre-tenant,

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Hill.

and had a decree. Such an agreement is void for the uncertainty of the sum to be paid. The lessee of the land cannot claim to hold discharged of tithes under any covenant with his lessor. An under-lessee is not an assign within the meaning of the covenant: nor can the tithes be bound by such a covenant of the lessee. A lease of tithes, or other matter which lies in grant, for all the time the lessor shall continue vicar, is good, and conveys a freehold.

* [1419]

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v.
Hill.

it is a right of retainer in the nature and with all the qualities of a demise, and if made by deed is good. *Hawkes v. Brayfield, Cro. Jac.* 137. And to constitute such an instrument, no form of words is essential. 3 *Bac. Abr.* 419.

[1420] The rent is certain if considered as 3s. 6d. *per acre*, as the tenant has done. If this is considered as a demise or retainer of the tithes, it is a grant of part of the thing itself, and no posterior grant can be good against it; but, if only considered as a covenant, yet it shall bind the covenantor, and all claiming under him. The cases cited all relate to collateral covenants; as, where the lessee of *Whiteacre* covenants to build a house upon *Blackacre*, that covenant runs not with the land, and his assignee shall not be bound by it. But the present covenant immediately relates to the tithes themselves, and cannot be collateral.

The plaintiff is within the covenant, for he is an assignee of part of the interest of *Trott* in the premises; even if not named, he would be bound by reason of the privity of estate. *Balley v. Wells*, 3 *Wils.* 25.

As to the small tithes, the lease is bad: it is for so long a time as the lessor shall continue vicar; and therefore void for the uncertainty. *Shep. Touchst.* 274-5. *Co. Lit.* 45. b. *Plowd.* 273. b. If it were good at all, it would convey a freehold; but for that purpose a livery of seisin would have been necessary.

Macdonald, Chief Baron, this day delivered the opinion of the court, and after stating the case, proceeded to the following effect: The defendant insists on the agreement between *Trott* and *Towers*, as discharging the land in his occupation from payment of tithes in kind, on rendering the composition of 3s. 6d. *per acre*; and as to the small tithes, he also objects to the title of the plaintiff, that the lease from Dr. *Bingham* is void for the uncertainty of its duration.

The plaintiff insists that he has the legal title in him, and that having purchased without notice of any agreement with the landholders, they can set up no equity against him.

To this the defendants have given two answers: 1st. that the agreement entered into between *Trott* and *Towers*, amounts to a lease of this portion of tithes from the former; and secondly, that if not a lease, it is a covenant running with the tithes, and good against the plaintiff.

It is true, no specific words are necessary to create a lease; but there must be words shewing the intent to demise. Here there is no certain rent reserved. *Trott* agrees to accept a reasonable composition, not exceeding 3s. 6d. *per acre*. Suppose he had claimed this sum of 3s. 6d. *per acre* from the tenant, would the tenant have been obliged to pay it? He, clearly, might have either preferred

to pay tithes of kind, or have tendered the reasonable value of the tithes under that sum. Then the sum reserved is not certain, and cannot be called a rent.

This also an agreement, not that *Towers* himself shall pay the rent and take the tithes, but only in favour of his tenants in the premises. *Towers* is to enjoy nothing, nor to pay any rent. It cannot be a demise to him. The tenant is not a party or privy to the transaction; it cannot therefore be a demise to him. It can, at the utmost, amount to no more than a mere covenant with *A.* that *B.* shall enjoy, and creates no lease to either. This is decided in *Littleton v. Perne*, 1 *Leon.* 136; and in *Porry v. Allen*, *Cro. Eliz.* 173. it is expressly so ruled by *Anderson*, Chief Justice.

Even if this had been a direct covenant with the terre-tenant, it could only have amounted to a covenant, that he should retain the tithes and pay a composition, or render tithes in kind; for the proviso gives him that option. By such a disjunctive covenant no interest passes.

From the whole of this clause taken together, with the proviso that accompanies it, I am clearly of opinion, that this can only be considered as a covenant, and not a demise.

But it has been argued, that it is such a covenant as runs with the tithes, and binds them in the hands of the plaintiff. This is the case of a covenant not contained in the original lease of sir *James Peachey*, but entered into by his under-lessee. The case of *Holford v. Hatch*, *Doug.* 184. establishes the rule, that an under-lease is a new substantive contract, independent of the other between the original lessor and lessee; whereas an assignee is one put in the place of the original lessee, and who becomes lessee to the original lessor. Then this covenant of the lessee could not bind the land in the hands of his under-lessee, as an assignee, according to the words of the covenant; and as no notice has been proved, the plaintiff is not affected with any equity from this personal covenant of his lessor.

As to the vicarial tithes, the rule laid down in *Shep. Touchst.* 274-5. *Co. Lit.* 74. *b.* as to the certainty of the term, is this, that such a lease for years of land is void. To this passage in *Co. Lit.* Mr. *Hargrave* has subjoined a note, in which he is well warranted, that in such cases, if a livery of seisin is made, the lease is good as a lease for life determinable on the particular event. But of rents or other things which lie in grant, the mere delivery of the deed has the same force as livery has in the case of land; and therefore any demise of uncertain duration, gives an estate for life determinable on the particular event. Then, if in the principal case there had been a vicarage-house or glebe demised, and the tithes had only passed as parcel of the vicarage, the whole would have been bad for

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[1421]

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want of livery ; but here the whole matter demised lies in grant, and the demise is therefore good, as an estate for life during the time that Dr. *Bingham* shall continue vicar.

There must be an account for both great and small tithes ; but I cannot avoid observing that the defendant fails, not from any want of equity or conscience in his case, but from the necessary application of a rule of law against him ; and, probably, he will be entitled to his remedy over against *Trott*, through whose bad faith he has been led into this mistake.

P. 34 Geo. III. A. D. 1794. Scac.

Parker v. Turner. [MS.]

On a bill for tithes, the defendant having answered and admitted the plaintiff's right to tithes, and stated what he alleges is due from him, may move, as of course, that the plaintiff may accept what is so due with costs to that time, or proceed at the peril of costs.

THIS was a bill for payment of tithes in kind. The defendant admitted the right to tithe, but insisted that only particular sums were due. And now

Abbot moved on the part of the defendant, that the plaintiff might accept the sum sworn by the answer to be due with costs to this time, or proceed in future at the peril of costs.

Lord Chief Baron and Thompson B.—This motion does not require notice : the answer is enough to support it : but the order now made must be served.

move, as of course, that the plaintiff may accept what is so due with costs to that time, or proceed at the peril of costs.

P. 34 Geo. III. A. D. 1794. Scac.

Hull v. Mathews. [2 Anstr. 444.]

Motion before answer that defendant be at liberty to pay into court 39*l.* as being the full value of the tithes, and the costs already incurred, and that plaintiff proceed at the peril of costs refused.

BILL for account of tithes. Motion, before answer, that defendant be at liberty to pay into court 39*l.* as being the full value of the tithes, and the costs already incurred, and the plaintiff to proceed at the peril of costs.

By the Court.—Till the answer, and discovery obtained from it, the plaintiff cannot know whether this is the whole or not, nor whether he ought to accept the money paid in.

Hood, for the motion ; *Bell*, against it.

ready incurred, and that plaintiff proceed at the peril of costs refused.

[1423]

M. 35 Geo. III. A. D. 1794. Scac.

Baker, Clerk, v. Athill. [2 Anstr. 491.]

S. C.
4 Wood's
Decr. 590.
It is sufficient in an answer if it gives the

IN this cause objections were taken to the answer, as being too loose. It insisted on a *modus*, without averring it immemorial, and admitted that the defendant did not know how long it had subsisted. It was not stated at what time the *modus* was payable. The *modus* was stated to be for cows, milk, and calves ; agistment-tithe was ad-

mitted in another part of the answer to be due, which was therefore insisted on as contradictory to the *modus* set up.

Macdonald, Chief Baron. — If this were a bill by the landholder to establish the *modus*, we should tie him down to an accurate statement of his claim; for he is bound to know it before he brings it into court: but in an answer, the tenant is brought within a limited time to answer whether he has any defence to make, and if he gives such a statement as will inform the plaintiff of the general nature of the case to be made against him, it is sufficient. The objections were over-ruled.

Some trifling impropriety had taken place in setting out the tithe of wool, for which the defendant had offered to make amends; the plaintiff claimed to retain his bill for that, and for *Easter* offerings, which had never been demanded nor paid. *Burton* cited the case of *Lawrence v. Yates*, in this court, 7th May 1727, where the bill being dismissed as to all other matters, the claim of *Easter* offerings was held too trivial to be the subject of a suit in equity, and the bill was dismissed. (a)

which were never demanded, are not sufficient to prevent a bill from being dismissed.

Macdonald, Chief Baron. — And besides, I apprehend it is always expected that a demand should be made for such articles.

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Baker
v.
Atwell.

plaintiff notice of the general nature of the case to be made against him.

A trivial incorrectness in setting out the tithe of wool, and for which amends had been tendered, and the non-payment of *Easter* dues

M. 35 Geo. III. A.D. 1794. Scac.

[1424]

Filewood v. Button. [2 Anstr. 498.]

THIS was a bill for tithes. — The only point made was for the agistment-tithe of horses. It appeared that the horses in question were kept by the defendant within the parish for the cultivation of his farm there, but were occasionally also sent to work at another farm of the defendant in an adjoining parish.

The Court said, they would have found some difficulty in deciding the case if the horses had been habitually so used; but as their being sent to the other parish was only occasional, they clearly were within the general exemption in favour of cattle used in husbandry. (b)

Sembl.
S. C.
4 Wood's
Decr. 449.
Horses kept on one farm for its cultivation, and used occasionally on another farm in a different parish, shall not pay agistment-

tithe; otherwise, it seems, if habitually so used.

(a) *Sed vide supra* 889., *Vernon v. Sloane*, where a demurrer to a bill by the rector of St. George Bloomsbury for *Easter* offerings was over-ruled by Lord C.B. Parker: *Perryn B.* mentioned this case in the argument in *Wake v. Russ*, *supra* 1396., and said, that he drew the demurrer.

(b) See also *Degge*, p. 2. c. 5. *Burn's E.L.* 474. *Burslem v. Spencer*, *supra* 746. *Bosworth v. Limbrick*, *supra* 1114. *Sandys v. Eastmond*, *Show. P.C.* 192. *supra* 558. *Stevens v. Aldridge*, 5 Pri. 334. *infra*.

1794.

M. 35 Geo. III. A.D. 1794. Scac.

Clarke
v.

Clarke v. Jennings. [2 Anstr. 498.]

Jennings.
S.C.
4 Wood's
Decr. 591.
A *modus*
described
by a map
annexed to
the answer
and referred
to therein,
held suffi-
ciently laid.
Issue di-
rected.

BILL for tithes. — The answer set up a *modus*, for a place described not by metes and bounds, but by a map annexed to the answer, (and referred to therein) in lieu of all tithes, or at least of tithe-hay.

Burton objected that the answer was too uncertain.

The court over-ruled the objection, and directed two issues, the one as to a *modus* for all tithes, the other as to a *modus* for tithe-hay.

M. 35 Geo. III. A.D. 1794. Scac.

Howes v. Carter. [2 Anstr. 500.]

Sheep kept
principally
for the sake
of folding,
if sold out
of the pa-
rish before
shearing
time, shall
pay agist-
ment-tithe.

THIS bill was principally for tithe of agistment for sheep. The sheep in question had been less than a year in the parish, had been brought in before shearing time in one year, and sold before shearing time in the next.

The demand was resisted by *Newnham* and *Richards* for the defendant, on the ground that the farmers in that neighbourhood find it necessary to keep a certain number of sheep, and to fold them on their grounds to manure it; that they consider the increase in the crop by this practice, as the principal gain from the sheep; and as the rector has his share of this profit, he is not entitled to any other tithe. They are to be considered like beasts of the plough, which pay no other tithe except in the increase of the crop which is produced by their labour. It was also insisted that the other profit arising from the sheep, the wool, had paid tithe; and that as they had not been in the parish a year, and had paid tithe of a year's wool, that was a discharge for the whole year.

[1425]
Supra 1048. *Plumer* and *contra*, relied on the case of *Bateman v. Aistroppe* as deciding the present question.

Macdonald Chief Baron. — As far as I understand the rule adopted in the decision of *Bateman v. Aistroppe*, the present case seems to fall directly within it; and if so, it would border upon presumption in this court to listen to any arguments in opposition to the authority of that case. I confess, if it had not been so decided, the arguments for the defendant appear to me, upon the reason of the thing, to have great weight.

Hotham Baron. — Supposing the year in tithing sheep to be a definite period, from shearing time to shearing time, as in grain or hay the year runs from harvest to harvest, the present question will be perfectly clear. The defendant paid wool-tithe for last year; he

has kept the sheep for half of another year, and has paid no tithe; then the tithe of agistment must be paid for that time.

Perryn Baron. — The case of *Bateman v. Aistroppe* is directly in point, and we cannot go into that question again after the decision of the House of Lords upon it. (a)

1794.

Howes
v.
Carter.

P. 35 Geo. III. A.D. 1795. In Canc.

Warden and Minor Canons of *St. Paul's* v. *Crickett*.

[2 Ves. Junr. 563.]

THE bill was filed by the minor canons of *St. Paul's* church, *London*, as parson and proprietor of the rectory of the parish of *St. Gregory*, against *Crickett* and *Griffiths*, and the object of the *bill was to establish the right of the plaintiffs under the statute and decree of 37 H. 8. c. 12. to tithes in respect of the houses of the defendants, at the rate of 2s. 9d. in the pound upon the rent; for which purpose the bill prayed a discovery and account.

The defendant *Crickett* by his answer stated the lease, under which he held at a rent of 1l. 2s. 6d. *per annum*, and a fine of 30l. and alleged, that he never heard of any greater rent being paid. The defendant *Griffiths* also opposed the demand; but did not allege the rent he paid to be the ancient accustomed rent.

It was objected, that the original jurisdiction of this court was taken away by the 19th and 20th sections of the decree, directing, that if any variance arise in the city for non-payment of tithes, or if any doubt arise upon the division of any rent or tithes or of any assessment thereof, or upon any other thing contained in this decree, upon complaint made by the party grieved, the mayor, by the advice of counsel, shall call the parties before him, and make a final end, with costs to be awarded by the discretion of the mayor and his assistants according to the decree: but, if the mayor make not an end thereof within two months, or if any of the parties find themselves aggrieved, the Lord Chancellor, upon complaint made to him within three months next following, shall make an end in the same with costs.

It was alleged, that an application had been made to the lord mayor, who declined to interfere in the matter on account of its importance.

Attorney General and *Solicitor General* for the plaintiffs. — The particular jurisdiction created will not oust the ancient jurisdiction.

Notwithstanding the statute and decree 37 H. 8. c. 12. the court of chancery has jurisdiction upon the subject of tithes in *London*. An account was decreed according to the improved rent. Another defendant setting forth his lease at a low rent and a fine, and alleging by answer that he had never heard of any greater rent being paid, there being no evidence against it, was held liable only according to rent.

*[1426]

(a) The Reporter must have misunderstood the learned Judge, as I am not aware that the case of *Bateman v. Aistroppe* ever went to the House of Lords. Mr. *Bateman* does not mention that it did in the account he has published of his case; and it was a circumstance which he

would scarcely have suffered to escape notice if it had actually existed: it would have been matter of additional triumph, as shewing that his victory was decisive: it would have been matter of additional complaint, as swelling the solicitor's bill.

1795. Courts of Equity have for a considerable time exercised this jurisdiction. *Langham v. Baker* *, *Hardr.* 116. 130. is a direct authority; and came on first upon a plea to the jurisdiction. That case was relied on in *Bennet v. Trepas* †, *Gilb.* 191. 2 *Bro. P. C.* 437. 8 *Vin.* 568. when the objection was made and over-ruled by the court of Exchequer. In *Grant v. Campbell* ‡, *Exch.* 5 *W. & M.* an account was decreed. In *Sayer v. Montford* §, *Exch.* July 6th, 6 *W. & M.* an account was decreed; and that decree was affirmed upon a re-hearing with costs. The same decree was made in *Townley v. Wilson* ||, July 6th, 1705, in *Williamson v. Gosling* ¶, *Exch.* 1762, and in *Kynaston v. Millar* **, in this court December 2, 1762, *Sheffield v. Serjeant* ††, *Cro. Car.* 596. The last case was *Bramston v. several Inhabitants of St. Botolph's*, *Exch.* May 7, 1787††: it was decreed, that the defendants, who had proved ancient customary payments of rents, should pay tithes accordingly; and that five others should pay after the rate of 2s. 9d. in the pound according to the yearly rent of their houses with costs. These authorities establish the jurisdiction; and also prove, that unless an ancient customary payment is made out, the payment is to be according to the improved rent. The intention of the decree was clearly, that the benefit of improvement should go to the clergyman as any other improvement with regard to tithes. Upon *Crickett's* answer the plaintiffs are entitled to an inquiry, whether the rent reserved by the last lease is the rent the premises were let for without covin previously to that lease.

Mr. Mansfield and Mr. Grant for the defendants. — In *Skidmore v. Bell*, 2 *Inst.* 659, it was holden, that the statute having given an express jurisdiction, the ecclesiastical court had none. There was no jurisdiction in any court before the statute. If a statute creates a new right, the party must be contented with the remedy that statute gives. It is clear, tithe of houses is not payable by common right. Dr. Grant's case, 11 *Co.* 16. is the single case in favour of it. It was held there, that by custom tithe of houses may be payable. That a *modus decimandi* can exist of a portion of a fluctuating rent, which is the ground of that decision, is questioned in 1 *Roll. Abr.* 642. and is directly contrary to Dr. *Leyfield's* case, *Hob.* 10.; and the note in the margin, “*nota*, that *modus decimandi* can hardly stand to rise and fall according to the rent by prescription,” shews Lord *Hobart* had not changed his opinion. What was the origin of the custom of paying a certain sum in proportion to the rent of the houses was always disputed. In the reports of special cases collected by Sir *Henry Calthorpe*, recorder of *London*, 62. it is stated, that by custom the *London* clergy were provided for by oblations of a halfpenny in the pound every *Sunday* and *Fast-day*: but when they were increased by the pope,

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* Supra
511.

† Supra
633.

‡ Supra
541.

§ Supra
544.

|| Supra
635.

¶ Supra
902.

** Supra
903.

[1427]

†† Supra
503.

†† Supra
1314.

Supra 227.

Supra 259.

Supra 263-4.

disputes arising, the question was set at rest by the statute. The case in *Hardres* proceeds upon the idea of a common law right. The court of Exchequer assumed that jurisdiction, founded, it should seem, upon their jurisdiction of revenue: but there is no common law right. An original jurisdiction in this court is inconsistent with their appellate jurisdiction. No case is made for an inquiry. This statute and 22 & 23 Ch. 2. c. 15. by which an exclusive jurisdiction is created, are in *pari materia*. In that statute, sec. 15. and the statute 22 Ch. 2. c. 11. by which this parish was united to that of *St. Mary Magdalen*, the rights of the warden and minor canons of *St. Paul's* are expressly reserved. It cannot be supposed, the legislature intended their income to be large: it probably struck them, that these old rates would amount to very little: otherwise it was a gross injustice not to make them contribute to the income of the incumbent. *Griffiths* ought to have an opportunity of inquiring, whether the payment they have so long received is not the customary payment.

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[1428]

Reply. — The cases in the court of Exchequer never could have existed on any principle, that would not authorize the jurisdiction of this court. The remedy by application to the lord mayor is in relief of the party, if that summary remedy is equal to the case. If the application to this court had been by petition, and they had refused to file affidavits, or in a case of covin, justice could never be obtained without a bill of discovery. Could it be meant to give an imperfect remedy? An exclusive remedy is given by the statute of C. 2. very properly; the subject being a certain incumbrance to be raised by assessment. It is the ordinary jurisdiction of justices of peace in analogous cases. As to *Griffiths*, where the rent was not the ancient accustomed rent but a varying rent before the decree, if it rises after the decree, the plaintiffs are clearly entitled to 2s. 9d. in the pound upon the rise. There is not in his answer a surmise of an accustomed rate of payment less than the demand; and *Crickett* has offered no proof of the allegation in his answer.

Lord Chancellor. — As to the jurisdiction, I am not at liberty to decline it. Upon the principles of law and the authorities it is impossible to allow the objection. The decisions cited, and the concurrence of opinion at different times by the judges are strong authorities. But independent of that I feel the force of the ground taken in the case in *Hardres*, that an act of parliament creating a special jurisdiction never ousts the jurisdiction of *Westminster Hall* without special words. Is there any vestige of an authority to the contrary? How is the Lord Mayor to exercise his jurisdiction upon leases by covin? If it is necessary to consider, whether this court possessed jurisdiction before the statute of H. 8. it is not

1795. *Warden, &c. of St. Paul's v. Crickett.* matter of doubt; for take the origin of this right according to the account in *Burn (a)*, which is an accurate historical account; it was a clear ecclesiastical right: it stands exactly therefore upon the same footing as other matters of ecclesiastical cognizance; and this jurisdiction is of necessity; for though the proper jurisdiction is in the spiritual court, yet that court may from its particular form be unable to execute its own jurisdiction; and then recourse must be had to equity; if accounts are necessary; or in cases of fraud; if [1429] the prosecution of the right depends upon matter of discovery. All those circumstances will lay the jurisdiction. But it is immaterial to consider that question; for I do not admit the argument, that if a statute creates a new right, you cannot go beyond it. I argue differently upon that: if a statute creates a new right, it creates a new duty: if the performance of that duty requires the interference of a court of Equity, the execution of the statute must of course be with the necessary circumstances.

The case in the second institute was an unhandsome struggle for jurisdiction; and the prohibition was, I believe, carried farther than in just reason it ought. But I can hardly figure a case in which the ecclesiastical court could be able to execute its own jurisdiction; for it must run into customary payments.

If the jurisdiction is clear, I must then take care, that in the exercise of it and the application to this court there is no vexation; and particularly because under the statute recourse may be had to another jurisdiction attended with less expence. As to *Crickett*, he has stated the lease under which he holds, the rent he paid, and what he could not put in issue, because it is negative, that he never heard of any greater rent being paid. There is no sort of evidence of any other having ever been paid from the earliest period. (b) There is not a colour of fraud or covin. What I should naturally do, unless there must be *pro formâ* a decree upon the trifling matter, for which he is clearly bound to account, would be to dismiss the bill as against *Crickett* with costs: but, if I was obliged to give a decree for that miserable sum, I should be still obliged to give him costs. *Griffiths's* case is different. He seems misled by attending more to the other case than his own. There is a clear case for a decree against him; and as he has opposed the plaintiffs upon a ground totally failing, there must be costs against him, unless you will let the cause stand without costs on either side by setting the costs against each other.

The defendant *Crickett* agreeing to pay the small sum, that was clearly due, the bill was by consent dismissed as against him with costs.

(a) 3 Burn's E.L. 551. *et seq.*

(b) See *Dunn v. Burrell and Goffe*, *supra* 299.

Lord Chancellor. — Mr. *Dickens* has furnished me with a case in point upon the question of tithes in the city of *London*; in which the point of jurisdiction was made by the answer; and Sir *Thomas Clarke* made a decree for an account of tithes (a).

1795.

*Warden, &c.
of St. Paul's
v.
Crickett.*

Tr. 35 Geo. III. A.D. 1795. Scac.

Lygon v. Strutt. [Anstr. 601.]

THIS was a suit for tithes of common lands inclosed by a late act of parliament, lying in the forest of *Duffield*, county of *Derby*. The plaintiff, the impropriator, derived his title from the college of *Newark*. The defendants insisted that the place was extra-parochial, and that the tithes of the forest had formerly belonged to the abbot of *Tutbury*, had come to the crown on the dissolution of that monastery; and had since been granted to the ter-tenants. They produced an ancient manuscript found in the herald's office purporting to enumerate the possessions of the monastery, and giving an account of the title to these tithes. The counsel for plaintiff objected to this evidence as a matter of right, but consented to admit it; and the court said, it could not have been received as evidence but by consent.

A book found in the herald's office purporting to be an account of the possessions of a monastery is not admissible evidence of that fact.

Tr. 35 Geo. III. A. D. 1795. In Canc.

[1430]

Strutt v. Baker. [2 Ves. Junr. 625.]

THIS bill was filed by *John Strutt*, as patron in fee of the rectory of *Little Baddow* in *Essex*, and as lessee for years of all the tithes under the rector presented by him, and by the rector and a lessee of the tithes from year to year under *Strutt*, against *Baker*, an occupier of lands in the manor of *Graces* in that parish, and sir *Brook William Bridges*, lord of the manor and owner of lands in that manor and that parish. The object of the bill was to establish the right of the rector to the tithes and for an account. The answer of *Baker* stated, that by ancient and immemorial usage within the manor of *Graces* or by other lawful ways and means the lands in his occupation had been exempt from the payment to the

Bill to establish the rector's right to tithes and for an account; the defence, though informally stated as a prescription *de non decimando* in a *que* estate, was as to

(a) *Kynaston v. Miller*, at the *Rolls*, November 11th and 15th, December 22d, 1762. The plaintiff as rector impropriate of the parish of *St. Botolph's Aldgate*, claiming tithes of houses within that parish, filed a bill in 1740 against some of the inhabitants for an account of tithes. The defendants by their answer said, these houses were not within the city of *London*; upon which an issue was directed; and it was found, that they were in *London*. Some of the defendants died. The plaintiff filed another bill against persons, to whom those houses and others had come, stating

that the houses were within the city of *London*, and praying an account of the tithes and payment. The defendants by their answer made two points: 1st, that it was a dissolved monastery of the *Cistercian* order, and exempt from tithes; 2dly, if they were liable, the plaintiff had, according to the statement in his bill, a remedy before the lord mayor under the statute and decree of 37 H. 8. On the 22d of December an account was decreed. (Reported more fully, *supra* 903.)

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two thirds possession by the lord of the manor under an apparent title by various conveyances, &c. stated by the answer, from 37 H. 8. of the lands with tithes generally or two-thirds specifically, with evidence of reputation and notice to the plaintiff, who had purchased the advowson and was lessee of the tithes: but the commencement of the title did not appear: the bill was dismissed with costs.

*[1431]

rector of the parish of *Little Baddow* or his lessees in the proportion of two thirds of all the tithes; and that the lord of the said manor was entitled to those two thirds. The defendants deduced their title under the following conveyances; which they set forth by their answers: in the 37 H. 8. a conveyance from lady *Bath* and sir *Thomas D'Arcy* of the manor of *Graces* and two parts in three of the tithes within the said manor of *Graces* with other premises to the crown in exchange for other lands: a grant in the 1 Edw. 6., granting to sir *Walter Henley* and his wife, "*totum illud dominium et manerium de Graces cum suis juribus membris et pertinentiis universis in Parva Baddow*," and several other premises and *omnes decimas* among many other articles in *Parva Baddow*, **Magna Baddow, Graces, ac alibi*: indentures of settlement in 1676 by ——— *Mildmay* in trust to raise money for debts and portions, and to secure a jointure upon his wife, and for settling the estate "and also all those two parts in three parts to be divided of the tithes of the said manor of *Graces*:" a recovery in 1687 to bar the estate tail of *Mary Mildmay* and to settle the manor of *Graces*: the deed to lead the uses mentioning tithes among other general words; and the writ of entry particularly specifying the two third parts: another deed in 1737: an agreement for a lease in 1750; and a marriage settlement in 1763, including the tithes either generally or by particular description. There was a strong evidence of reputation, that these lands only paid one third of the tithes, *i. e.* a thirtieth part of the produce, to the rector, and were therefore called thirtiethable lands. *John Wiggins* proved, that upon the sale of the advowson to *Strutt*, the plaintiff, the deponent, being steward to the owner of the estate, took an accurate valuation of all the tithes in order to set a value upon the advowson; and in that valuation he considered all the lands within the manor of *Graces* as rendering to the rector only a thirtieth part of the produce. The rector never received more than one third of the tithes. The lord of the manor received the other two thirds, and let some farms with the two thirds of the tithes. Other leases were made expressly subject only to one third to the rector.

Solicitor General and Mr. *Ainge*, for the plaintiffs. — The answer of *Baker* cannot be supported; for it is, though informally stated, simply a prescription *de non decimando* in a *que estate*. There cannot be such prescription: *Bishop of Winchester's case*, 2 Co. 43. and *Winchcomb's case**, there cited, Cro. El. 293. *Piggott v. Hearn* †, *Piggott v. Simpson* §, Cro. El. 599. 763. If they claim a portion of the tithes, that must be derived under a title from an ecclesiastical person; and they cannot so claim, having made their defence upon the ground of a lay-fee in the lord.

Supra 167.

* Supra 164.

† Supra 200.

‡ Supra 203.

Attorney General and *Mr. Sutton*, for the defendants. — The defence is stated inartificially: but it is not meant to state an exemption from tithes, but an exemption from paying to the rector, because that portion belonged to the lord. It happened that the same family who had the tithes, had the manor: but it is not asserted, that the lord took them in that character. It is so substantially stated, that the court will leave the plaintiffs to law, according to the late uniform practice of this court and the court of Exchequer, where there has been an actual pernancy of tithes by lay hands under conveyances as lay property for a great while. The [1432] court will not by equitable aid disturb such a possession, which might have a lawful commencement, by calling on the defendants to shew a lawful commencement: *Fanshaw v. Rotherham*, before Lord Northington: *Scott v. Airey**, *Exch. Edwards v. Lord Vernon* †, *Exch.* 1781. This bill goes farther than any in calling upon the court to establish the right of the rector, who never has had possession, against the title of those who have had it so long.

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v.
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Supra 1177.

* *Supra*
1174.

† *Supra*
1177.

Reply. — In *Scott v. Airey*, which is the only case of a spiritual rector, there was an actual pernancy of the tithe; upon which fact the judges relied: This is a mere retainer. In *Fanshaw v. Rotherham*, I apprehend, there was also a distinct pernancy: but as cited by Baron *Eyre* in *Scott v. Airey* it seems to have gone upon the strong distinction between a lay impropiator, who could alien, and a spiritual rector, who could not. In the former case there was no reason to distinguish tithes from the other property of the lay impropiator; and there might fairly be a presumption of title, where there was any thing like an actual pernancy. *Edwards v. Lord Vernon*, I believe, proceeded on the same ground.

Lord Chancellor. — Of all purposes for which a bill could be brought, this bill is the worst calculated for quieting the question; for it appears, there never has been a question from the middle of the sixteenth century with regard to the right or possession of these tithes claimed by the plaintiff. At the end of the eighteenth century this bill is brought to raise a question, that appears never to have existed, at least from the 37 *H.* 8. The ground upon which this court interferes upon tithes, is either matter of account where the general right to collect the tithes is not in controversy, but the quantity due; and the account is better carried on in this court than in an action on the stat. 2 & 3 *Ed.* 6. c. 13. which is a penal statute. But I should be sorry, it should be understood, that if by the rule the judges have adopted in the trial of actions upon the statute the plaintiff cannot make out his case at law, that is a sufficient ground to come here to be relieved from that sort of construction, which the judges of the common law have raised upon trying such actions. The defence is very fairly to be collected from

1795. *Strutt v. Baker.* *
*[1433]
- the answer. The person who drew it, if he knew what a plea was, did not mean to put in a plea of prescription against the *demand of the tithes. That plea, not only in substance, but in the manner in which this is expressed, “or by other lawful ways or means,” would be clearly bad. It is quite impossible it could have stood. He could not apprehend he was drawing a plea. But the answer has very fairly set out all the facts which constitute the defence, and put the plaintiffs in possession of all that case he is to meet; and it is no matter how it is argued in the answer. It states different instruments, family conveyances, purchases, securities made, conveyances to raise money for debts and portions, and recoveries; and wherever it was necessary to describe specifically the things which passed, as, upon the recovery in the writ of entry, upon which the fine to the crown is taken, the two thirds of the tithes in this manor are particularly mentioned. The parol evidence is the strongest that can be of reputation; the denomination which the lands had acquired of thirtiethable land from paying only a third of the tithe to the rector; the particular knowledge every one on the spot had of the peculiarity respecting these lands; and the evidence of *Wiggins*, who in his valuation upon the occasion of the sale to this very plaintiff, considered them as rendering to the rector only a thirtieth part of the produce; which of course entered into the value of the advowson. The plaintiff therefore purchased a right with regard to these lands only to a thirtieth instead of a tenth. I am glad to have been furnished with the authorities, in which this court and the court of Exchequer have refused to aid against a long possession accompanied with family deeds and purchases any inquiry into the right, by which the tithes were held. Courts of Equity have no jurisdiction to affect the purchasers. In the course of this long period, in which no tithes have been paid to the rector beyond a third part, there must have been many purchases; and Lord *Northington* laid particular stress upon that. Why is a court of Equity to interfere to destroy a title acquired under a purchase for valuable consideration? In *Scott v. Airey* there was an actual occupation of the tithes. What is the evidence here? In some of the leases the land is described expressly as subject only to one thirtieth to the rector: in others the farm is let, and the two thirds of the tithes are particularly specified as demised. On the other hand, when the lessee enters, he does not merely retain: he pays tithes; for he pays a thirtieth instead of a tenth; and that is clearly an ouster *quoad* the two thirds retained. It is full notice to all succeeding rectors, that it was not by fraud or subtraction, but an assertion of right in opposition to that of the rector, and as clear an adverse possession, strongly manifested by paying only one thirtieth instead of one tenth; there-

fore the difference is only in words between this case and *Scott v. Airey*. The manner in which this owner has exercised his right, is, by demising the land and the tithes of that land to the same person, and receiving an accumulated sum for both the tithe and the land. It is not necessary to enter into the discussion of the title. I can conceive a clear ground; the tradition of the parish shews it. Is it necessary to put the subjects of this kingdom to account for their titles antecedent to the reign of *H. 8.*? If so, it is not for a court of Equity to put them under that inquisition. Therefore I am perfectly warranted in following the precedents so very respectable. Lord *Northington* does not put it upon the circumstance of the lay rector; but expressly negatives the proposition, that there may be a prescription against him, and gives him every privilege of a spiritual rector. Upon the circumstances of long possession and apparent title upon the face of the deeds, family settlements, and leases, for a long time, he would not in a court of Equity interpose to affect it, and aid a person coming to disturb it. There is no ground for an issue; for a court of Equity giving the least succour to break through the fences, which by the law the party is entitled to maintain, would act against its own principle, and disturb instead of quieting possession, the object of bills in this court, and to which it has a general tendency. The one third of the tithes is not in dispute; therefore there is no ground to maintain the bill as to that; and upon *Wiggins's* evidence there must be costs; for it is a bill by a purchaser to get an advantage he had no right to, and with full notice, that he had no reason by the terms of the purchase to expect it. (a)

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Tr. 35 Geo. III. A. D. 1795. Scac.

Lord Stowell v. Atkins. [2 Anstr. 564.]

THIS was a bill to establish a *modus*. — *Burton* objected that the *modus* was not properly set out, being pleaded as a farm *modus*, and the farm not stated to be ancient, and to have immemorially consisted of the same parcels as at present. These averments he contended to be necessary, and that they had often been so declared by Mr. Baron *Perrot*. The defendant is not bound to pick out the meaning of the plaintiff by any inferences. The bill must state expressly the case, to be answered.

S.C.
4 Wood's
Decr. 459.
A bill to
establish a
farm *modus*,
setting out
the abutments
of the farm,
and stating
that the
modus had.

[1435]
immemor-
ially been
paid for the

Partridge and *Plumer*, for the plaintiffs, argued, that the bill contained every necessary allegation. It set out the farm, with all its parcels, the number of acres, and the abutments of each close, and

(a) See also *Barker v. Barker*, Wightw. 398. *Heathcote v. Aldridge*, 1 Mad. 239. *infra*. *Meade* *infra*. *Berney v. Harvey*, 17 Ves. 119, *infra*. *v. Norbury*, 2 Pri. 338. *infra*.

1795.

Lord
Stowellv.
Atkins.

said farm,
is good,
without
stating it
expressly to
be an an-
cient farm.

averred, that the *modus* had immemorially been paid for the said farm. This allegation can only be supported by proving, that the farm is ancient, and has immemorially continued the same as it is now.

Macdonald, Chief Baron.—This seems to me to be in sense a sufficient averment of its being an ancient farm. If it had not immemorially continued the same, the *modus* could not have immemorially been paid for the same farm. The exclusion of any other supposition seems a sufficient averment of the fact.

Hotham, Baron.—It is very true, that in bills to establish a *modus*, it is necessary to set forth with certainty the case which the defendant is to answer; but here we must see, that the antiquity of the farm is a necessary part of the plaintiff's case, as stated in the bill. No precise form of words seems necessary if the meaning be clear.

Perryn, Baron.—Mr. *Burton* has stated very correctly the opinion of the late Mr. Baron *Perrot*. In a bill to establish a *modus*, the plaintiff must state his case clearly, and can only recover according to his allegations. The being an ancient farm is a necessary part of the present case, and ought to be distinctly averred, not left to be drawn as an inference from other averments; and the practice has always been accordingly.

The point being reserved upon this difference of opinion, this day,

Perryn, Baron, said, that, upon further consideration, he acquiesced in the opinion of the other Barons.

Partridge, *Plumer* and *Trower*, for the plaintiff, produced evidence of the existence of the *modus*, and shewed, that an action had been brought by one of the defendants, the lessee of the tithes, for subtraction of tithes in kind.

The defendants were the tenant for life and his lessee, and the remainder man of the impropriate rectory.

Burton, for the lessee, and *Hollist*, for the remainder-man, contended, that this bill did not lie to establish a *modus*. Such a suit is in the nature of a bill of peace, which can be brought only in three cases:

1st, Where the party is harassed by repeated suits.

* 2d, Where several persons claiming under a general right threaten to bring separate suits, as in parochial or manerial rights disputed.

3d, Where a bill for tithes has been instituted in the same court. The bill to establish a *modus* is in this case only considered as a cross bill, to furnish the defence which is set up in the original suit, and to give the farmer the benefit of his defence against future attempts to invade his right.

In a bill of peace, a threat to sue is an equally good ground of equity as an action commenced; as, where a devisee is threatened by the heir with a second action of ejectment after nonsuit in the

If an action
is brought
by the lessee
of tithes for
subtraction,
it is a suf-
ficient
ground for
filing a bill
to establish
a *modus*.

*[1436]

first, he may bring his bill to establish the devise, without waiting for the commencement of the second suit. But it was determined in the case of lord *Coventry v. Burslem* *, in this court 25th April 1788, that although the defendant, in his answer, admitted that he always had claimed, and intended to sue for, tithes in kind, yet that was no ground for a bill to establish a *modus*. So here, the single suit commenced by the lessee of the tithes is no ground for supporting such a bill. The landlord has never claimed tithes in kind, and it is dangerous that the lessee should be allowed, by any conduct of his, to bring the title to the inheritance in question.

1795.

Lord
Stowell
v.
Atkins.

* Vide infra
1596.

The court did not expressly decide upon this objection, but thought it expedient for all parties to try the right in an issue; which the defendant, the lessee, agreed to take; and although the other defendants did not consent, the decree was made generally for an issue.

M. 36 Geo. III. A. D. 1795. Scac.

Worral v. Miller. [3 Anstr. 632.]

THIS was a suit for tithes of the produce of a hot-house and other things. The defendant resisted the demand for tithes for the hot-house, but admitted the others to be due.

Benyon, for the defendant, moved for leave to pay into court the value of the other tithes, with the costs of that part of the suit, and the plaintiff to proceed at his peril; comparing the case to payment of money into court on one count of a declaration.

Richards contra,

The court refused to allow the motion unless on payment of the whole costs then incurred.

M. 36 Geo. III. A. D. 1795. Scac.

[1437]

Ord v. Clarke. [3 Anstr. 638.]

IN this cause the defendant set up a *modus* to cover part of the lands of which tithes were sought by the bill. The *modus* was payable by the owners of the land. (a)

S. C.
4 Wood's
Decr. 480.
A *modus*
payable by
the owners
of the land
covered by
it, is good.

Burton objected that this was unreasonable, as the parson was thereby obliged to seek about for the person to pay him his *modus*, instead of claiming immediately from the tenant either the *modus* or tithes in kind. Perhaps, where the tithes arise subsequently to the time of the *modus* being due in each year, this remedy may

(a) This was a *modus* of 8s. payable by the owner of an estate, described to be "a certain ancient estate, called *Rothwell Haigh Estate*, containing, &c." of which the defendant's farm formed a part.

1795.

Ord
v.
Clarke.

be open to him under the present *modus*; but, for those tithes which annually arise before the time fixed for paying the *modus*, the parson has no compensation, unless he can find the landlord, there being no remedy against the tenant.

Partridge and *Johason* insisted that this might well be a fair and reasonable agreement at the time of its commencement before memory, when the ownership of land was not subject to so much uncertainty and fluctuation as at present; probably, the parson then thought it more advantageous to have the landlord as his security than a poor tenant.

Macdonald, Chief Baron. — Undoubtedly, the parties might make this agreement on what terms they thought proper, and there seems nothing to render it impossible that the composition may have been entered into in the terms stated by the answer. The common practice is to make the occupier answerable: but, perhaps, the parties may have thought the other mode more beneficial in point of security; and we ought not nicely to weigh the validity of that judgement.

Supra 679. The other Barons concurred, and Mr. B. *Thompson* mentioned the case of *Chapman* and *Monson*, 2 P. Wms. 573. as an authority that the court ought not narrowly to investigate the reasonableness of a *modus*, which presumes a composition with consent of the parson, patron, and ordinary, before time of memory, although, perhaps, it may not now appear a wise provision for the interests of the parties in every respect.

[1438] The *modus* was claimed in respect of divers pieces of land, consisting of about sixty-one acres, parcel of an ancient estate called R. estate, consisting of 1500 acres, covered by the *modus*.

Burton objected that the lands should have been set out by metes and bounds.

The court thought the description sufficiently certain.

M. 36 Geo. III. A.D. 1795. Scac.

Tennant v. Stubbing. [3 Anstr. 640.]

S.C.
4 Wood's
Decr. 484.
Stubble
mowed and
used as
fodder or
manure is
not tithable.

THIS was a suit by the plaintiff as vicar of *Higham* in *Suffolk* and lessee of the rectory, for an account of several species of tithes. One point in the cause was, whether tithes were payable of stubble mowed and used as fodder.

Burton and *Bell* insisted that tithes were due for the stubble, as they would have been for the straw, where the stubble is used in the same manner as straw. They relied on *Burn's Ecclesiastical Law*, tit. *Tithes*, c. 5. s. 5.

Partridge and *Pemberton* contended that tithes are only due for the first cutting of the straw, and that like the aftermowth of hay

the stubble is not tithable. They insisted that the authorities 1 *Roll. Abr.* 641. 2 *Inst.* 652. had never been over-ruled, and that the note in *Burn* was a mistake.

1795.

Tennant
v.
Stubbing.

Macdonald, Chief Baron.—It appears that the stubble in question was partly used for fodder, and partly for manure; so that the whole of it was consumed in the husbandry; and it is not the case of a farmer leaving an unusual quantity of stubble to make a fraudulent profit of it. It is decided in the authorities cited from *Lord Coke's Institutes*, (2 *Inst.* 652.) and from *Rolle's Abridgement*, (1 *Abr.* 640.) that no tithes are due for such stubble.

A doubt is suggested in *Burn*, on the general principle that tithes are due of every increase of the land, and the modern practice of the courts of Equity is said to be contrary to the old authorities: but this seems to be a mistake; no case to that effect is mentioned in the books, nor exists in the memory of any person. The old authorities decided the point, which seems to have been at rest ever since. (a)

Another question arose concerning the mode of tithing wheat in the parish. The answer insisted on a custom of tithing by making up the wheat, when cut into equal sheaves, permitting the rector (to whom notice of carrying away the wheat was first to be given) to take every tenth sheaf, and in case of his neglecting to attend for that purpose, setting out for him every tenth sheaf as it was taken to the cart employed in the removal of the wheat.

[1439]
A custom of tithing, by throwing aside every tenth sheaf, as the corn is about to be carried, is bad.

The custom of the parish appeared to be to make up the sheaves into shocks or threaves, in the size of which uniformity was not regarded; and that the tithes were never set out till each tenth sheaf came to the fork and was thrown aside for the rector, he having no other election or opportunity of judging of the fairness of his tithes, except by rejecting the tenth sheaf when about to be thrown aside for him, and taking the eleventh.

Tithes must be set out so that the rector may compare them with the other parts. Where by the custom notice of tithing is to be given, an hour's notice is not sufficient.

The same practice was observed in this particular case. The wheat had been unequally shocked, and only one hour's notice of carrying it away was given; the rector did not attend; every tenth sheaf was thrown aside for him, and the sheaves were sworn to have been equal; he refused to accept the tithes so set out, and they were left to rot upon the field.

It was insisted for the rector that the customary mode of tithing, as proved, was illegal. It is essential in the mode of setting out tithes, that the parson shall have an opportunity of seeing the tithes separated from the other nine parts, so as to compare the one with the other. *Watson* 551. Whether they are set out in shocks or in sheaves, if the tithes are regularly set apart, he has this opportunity;

(a) See *Andrews v. Lane*, *supra* 477. *Franklin v. The Master, &c. of St. Cross, Bun.* 78. *supra* 629.

1795.
 Tenant
 v.
 Stubbing.

he can see whether he has his proper proportion of shocks, or sheaves, and whether those set out for tithes are of equal dimensions with the others. Where the tithes are taken in sheaves, and all the ten parts are put by the farmer into unequal shocks, the rector can neither compare the size of his sheaves with the others, nor can he calculate the number to which he will be entitled. He may, indeed, if he attends, observe the size of each sheaf, and take the eleventh instead of the tenth; but if, by the order of putting the sheaves into the cart, the tenth is generally a small one, and therefore rejected, the rector will only have one eleventh part of the corn instead of his tenth: besides, this abridges his opportunity of comparing them to the moment of carrying away the corn, whereas he is by common law entitled to the whole space of time between the cutting and carrying it away.

[1440] But, if the custom were good, it has not been complied with. Notice must be given to the rector; that implies reasonable notice; but in the middle of harvest, while the rector is engaged in tithing the other fields and farms in the parish, and liable to be employed in the discharge of his religious duties, it is impossible that one hour can be sufficient notice.

For the defendant it was argued, that the custom set up was good, and had been complied with. It is proved that the sheaves were equal, and that every tenth was thrown aside for the rector; then actual fraud is negatived. In tithing by sheaves, the farmer is not in general bound to shock the tithes, nor to give any notice to the rector; by the custom he does both: then supposing it to be true that the rector has not the usual opportunity of comparing the ten parts, the advantages and disadvantages given by the custom are reciprocal and legal.

But in fact the rector can as well compare the sheaves when each is thrown into the cart, as if they were dispersed through the field; and the choice of taking the eleventh in place of the tenth gives him a superior advantage.

The notice must be reasonable according to the nature of the subject-matter. The farmer resolves to carry away the corn when he perceives it to be in a proper state, or sometimes very suddenly, upon the appearance of approaching bad weather. In such a case an hour's notice may be as much as can be given, and the rules of tithing cannot compel the farmer to lose the best opportunity of housing his crop, and so endanger its safety.

Macdonald, Chief Baron. — The custom of tithing wheat, as laid in the answer, seems not materially to differ from the common law mode of tithing by sheaves, and is clearly good where that practice has obtained. But the evidence has introduced another part of the custom, essentially differing from the common law mode of tithing,

and highly prejudicial to the tithe owner. By the custom the farmer is to put the sheaves into shocks of uncertain and, in the present case, of unequal magnitude. This custom seems to us to be unreasonable, and therefore void, for it deprives the tithe owner of an advantage which the law always gives him, of having his tithes so set out that he may compare them with the other parts. The custom proved differs also essentially from that laid, and therefore does not support the allegation in the answer.

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The notice given is also insufficient. The notice should be such [1441] as will give the rector time to attend the setting out of the tithes. But when we consider that the rector has other functions which demand his attention, and which may, for a considerable time, require his presence at the further extremity of the parish, it is impossible to say that an hour is sufficient notice for him to see that he is not defrauded of his dues.

As the defendant has not therefore brought himself within the custom as laid; there must be an account directed against him for this species of tithe. (a)

H. 36 Geo. III. A. D. 1796. Scac.

Franklyn v. Gooch. [3 Anstr. 682.]

THE bill was for an account of tithes of wheat in a particular field, in the year preceding the filing of the bill. It appeared that the wheat had remained standing very long from the wetness of the season, and the weather continuing very precarious, the defendant was obliged to cut small parcels of it at a time, and carry it home immediately when a cart load was cut. He gave notice to the clergyman that he was going to cut and carry what part of it he could, while the weather was fair. The plaintiff attended to see it tithed, and the defendant proceeded to fill a cart-load, throwing nine sheaves into the cart, and laying aside the tenth sheaf for the tithes. The plaintiff refused to take his tithes unless he saw the whole tithes of the corn cut down regularly set out before any part should be carried away. He did not object to the size of the sheaves thrown aside for him, and they were sworn to be equal to the others.

S.C.
4 Wood's
Decr. 591.
Setting out
of tithes
cannot be
dispensed
with, even
although
the uncer-
tainty of
the weather
prevents the
corn from
being put
in shocks at
all.

Partridge contended that the clergyman is in all cases entitled to have his tithes set out, and relied on *Tennant v. Stubbing*.

Supra 1438.

Plumer and *Richards*, for the defendant, insisted that the farmer was justified by the necessity of the case, in omitting the usual form of setting out the tithe. The mode of setting out the tithe of each article is adapted to the convenience of agriculture, and, of

(a) See also *Boughton v. Wright*, Bun. 186. *supra* 658. *Halliwell v. Trappes*, 2 Taunt. 55. *infra*.

1796.

Franklyn

v.

Gooch.

[1442]

* *Infra*

1489.

course, must shift with circumstances, it never being intended that the farmer should adopt an unprofitable mode of husbandry, for the purposes of tithing. *Collyer v. House*.* Besides the sheaves offered being the full tithes, the refusal to accept them, upon a formal objection, is such a conduct as a court of Equity ought not to countenance.

Macdonald, Chief Baron. — The case made by the plaintiff is extremely unfavourable. The farmer trusted to his not objecting, and acted upon a seeming acquiescence, and the objection at last is not grounded upon any pretence of unfairness in the tithes offered him. In a case so vexatious, and so unseemly in a clergyman, the court would be glad to find any sufficient ground, from the state of the weather at the time, to justify the mode of tithing adopted, and to dismiss the bill with costs; but the conduct of the farmer in not setting out the tithes was not strictly correct and cannot be supported. An account is therefore unavoidable, but it must be without costs.

H. 36 Geo. III. A.D. 1796. Scac.

Nagle v. Edwards. [3 Anstr. 702.]

S.C.
4 Wood's
Decr. 486.
Variety of
inconsistent
defences.

THE plaintiff sued as lay impropriator of the parish of *L.* in *Wales*, for tithe of hay and agistment.

The defendant set up ten or twelve defences to this claim, several of which were inconsistent and contradictory. A doubt at first arose, whether this should not be considered by the court as an abuse of their pleadings, and, as such, be rejected as not being a proper defence; and it was insisted that this ought to be done, because the plaintiff is distracted by the multifarious defence, and does not know to what his evidence or the arguments of counsel should apply.

But it appearing that the plaintiff had not been guilty of any intentional misconduct, and that it wholly arose from mistake in his legal advisers, the court went into the defence.

Partridge and Hall, for the defendant, insisted upon two grounds of defence:

1st, That from tithes of hay and agistment never having been paid to the rector within memory, a conveyance of them to the landholder should be presumed.

2d, A *modus in non decimando* for hay and agistment, covering this and many adjoining parishes, being a very large tract of country, of which the tithes were formerly vested in the abbey of *L.*

As to the first, they contended that this was not a claim of a *modus in non decimando*, and, therefore, not within the decision of the case of *Bury St. Edmund's v. Evans**, and the other cases upon that sub-

* *Supra*
757.

Mere non-payment of a particular species of tithes is no evidence against a lay rector of a conveyance of that tithe.

A prescription in *non decimando*

ject. Those decisions went upon the ground that, in order to found a prescription, the presumption must be of a right prior to the dissolution of the monasteries. *Com. R.* 651. But, since the ecclesiastical property has come into lay hands, its nature is changed; by 32 *H. 8. c. 7.* it is become like any other lay property, is transferred by the same conveyances, and its title is tried by the same actions as any other incorporeal hereditament. The effect of length of time to support possession, as evidence of some grant or other title, is considered by lord *Mansfield*, *Comp.* 109. as a general rule of law; accordingly it has been applied, in several cases, to claims of tithes as well as other property. *Scott v. Airey**, *Mawbey v. Edmead*†, &c. By 21 *Ja. 1. c. 2.* 9 *Geo. 3. c. 16.* even the claims of the crown are lost by sixty years non-claim.

As to the second point, they argued that a custom *in non decimando* for a large tract of country is good. *Doct. & Stud. c. 55. p. 147.* 2 *Inst.* 645. *Hicks v. Woodson*‡, 4 *Mod.* 396. *Carth.* 390. 2 *Salk.* 655. *Skin.* 560. § Those authorities go to all sorts of tithes, to those due of common right, as well as others. The distinction is, that a tract of country may prescribe; an individual, or even a parish, cannot. 1 *Barnardiston*, *K.B.* 71.

Plumer and *Richards*, for the plaintiff, argued, that the claim of exemption by presumption of a grant was only another mode of stating a *modus*, *in non decimando*, for wherever the evidence would support such a *modus*, *à fortiori* it must support the present defence; and the effect of such a defence is, therefore, determined by the case of *Bury St. Edmund's v. Evans*. The case of *Scott* and *Airey* does not apply to the present. That was a dispute between two claimants of tithes, each deducing a title to the tithes distinct from the title to the lands, and the claimant, who happened also to have the land, was in possession of all the tithes, and demised them to the tenant together with the land. Here the rector has received all the tithes that have ever been taken, and it is clear that he has a *prima facie* right to all, whether he has had actual perception of every species or not. *Benson v. Olive*, *Bunb.* 284. The defendant does not pretend that his lease contains a demise of the tithes of hay and agistment; his landlord has never demanded those tithes of him, and therefore neither of them has possession to set up against the *prima facie* claim of the rector, as in *Scott v. Airey*.

As to the other point, they insisted that a *modus in non decimando* could only be claimed in a large and known division of the country, as the weald of *Kent*, or of *Sussex*; or for a hundred or county, but not for a parish, or for a few contiguous parishes; and the case cited, *Hicks v. Woodson*, supports this distinction. By that case, as reported in 2 *Salk.* 655. 1 *Ld. Raym.* 137. it is decided, that even a county or hundred cannot prescribe *in non decimando* for things

1796.

Nagle
v.

Edwards.

can only be set up for a large tract of country, well known as a distinct district.

Whether such a prescription can be pleaded against payment of tithes due of common right? Qu.

* *Supra* 1174.

† *Supra* 1265.

‡ *Supra* 550.

§ *Supra* 492.

Supra 701.

[1444]

1796. which are *de jure* tithable, and Dr. Burn draws that conclusion from all the cases. 3 Burn 393.

Nagle
v.
Edwards.

Macdonald, Chief Baron.—The plaintiff having made out a clear title to himself as rector, the defendant insists on exemption from payment of hay and agistment-tithe, on the ground of having never paid these tithes; from non-payment he wishes the court to presume a grant or conveyance of these tithes from the lay impropriator. It is clear that, against an ecclesiastical rector, this defence could never be set up in any shape. Whether a lay impropriator should have the same benefit was at first doubted, but that point seems now at rest. Three successive decisions upon it have fully established that there is no difference between a lay and an ecclesiastical rector. *Benson v. Olive**, in 1730, *Charlton v. Charlton* †, in 1732, and the corporation of *Bury v. Evans*.‡ (a)

* Supra
701.

† Supra
715.

‡ Supra
757.

As to the other point, also, it seems clearly established, by the case cited from 1 Lord Raym. 137. and in *Salkeld*, that a *modus in non decimando* can only be claimed by some well known division of the country. The present claim is extended to certain parishes enumerated in the answer, and which have not any common denomination, nor any mark by which they can be considered as a distinct and separate district. The claim of a *modus* being therefore bad, in respect of the territory to be covered by it, it becomes unnecessary to consider the other question, as to what species of tithes such a *modus* may apply.

The court decreed an account.

Tr. 36 Geo. III. A.D. 1796. Scac.

Franklyn v. Spilling. [3 Anstr. 760.]

S.C.

4 Wood's
Decr. 496.

A *MODUS* was claimed for hay. The terriers described the *modus* to be for all mowing grass, "except clover and the like."

It was objected that as the article excepted was not known beyond time of memory, a *modus* containing that exception must be modern.

[1445] The Court thought that the expression in the terrier was not to be taken as an exception annexed to the *modus*, but merely as a memorandum that the *modus* covered natural hay only, and did not extend to modern artificial grasses.

(a) See *Fanshaw v. Rotheram*, supra 1177, where the cases on this point are collected.

Tr. 36 Geo. III. A. D. 1796. Scac.

1796.

Scarr v. Trinity College, Cambridge, and Wood. [3 Anstr. 760.]

Scarr
v.
Trin. Coll.
S. C.
4 Wood's
Decr. 494.
Agistment
is a predial
tithe. A
contribu-
tory *modus*,
described in
the follow-
ing manner,
— "there
are and im-
memorially
have been
certain an-
cient town-
ships, ham-
lets, and
districts,
within the
rectory and
parish of
Aisgarth in
the county
of *York*,
called *A.*,
B., & *C.*, dis-
tinguished
by certain
well known
boundaries
and limits;
that by an-

THE original bill was filed for agistment-tithe; this cross-bill was to establish *moduses*. It stated that there are and immemorially have been certain ancient (towns,) townships, hamlets, and districts, within the rectory and parish of *Aisgarth* in the county of *York*, called *A.*, *B.*, and *C.*, distinguished by certain well known boundaries and limits; that by ancient usage, custom, or prescription, all the lands within the said township, (hamlets and districts,) and the owners and occupiers thereof, have been immemorially exempt from the payment of all predial tithes, &c. or any other satisfaction for the same than the yearly sum of 4s. 4d. payable to the rector on *Michaelmas-day* in each year, or as soon after as demanded, which hath immemorially been raised by way of contribution among the owners and occupiers of such lands, and constantly been paid by them, or some of them, to the said rectors, &c.

The cause was argued in a former term, and several questions arose; the most material was, Whether the *modus* laid for all predial tithes, covered tithe of agistment? It was proved that agistment-tithe had never in fact been received, and that by the opinion of the country, it was not payable; the places for which the exemption was claimed were very extensive moor lands, about 20,000 acres.

cient usage, custom, or prescription, all the lands within the *said townships*, &c. and the owners, &c. have been immemorially exempt from the payment of predial tithes, &c. or other satisfaction for the same than, &c. held sufficiently laid.

Partridge, Anstruther, Campbell and Topham, for the plaintiffs, argued, that agistment is a predial tithe. Those tithes are called predial which arise immediately from the ground; those are mixed which arise by the improvement or increase of some animal. Agistment-tithe is paid, not for the increase or improvement of the animal agisted, but for the grass eaten by it, and is proportioned to the value of the grass, not to the value of the actual improvement; *Freem.* 329. *Holbeach v. Whadcock*, *Hardr.* 184. *Ellis v. Saul*, *Lindw.* 194. *Degge* 217; therefore, where the occupier of land does not agist his own cattle, but those of strangers, the tithe for the agistment of barren cattle is due from the occupier, as being owner of the grass for which the tithe is paid; but, if the cattle are profitable, the owner of them is accountable for the tithes. *Underwood v. Gibbon*, *Bumb.* 3. *Fisher v. Le-*
men, 9 *Vin.* 38. *pl.* 7. If the grass has before paid tithe of hay, no tithe is due for agistment of the aftermath; then the tithe is at-
tached to the grass, not to the cattle.

Supra 1326.

[1446]

Infra 1582.

Supra 626.

1796.

Scarr

v.

Trin. Coll.

Objection, that the *modus* was claimed for owners and occupiers, over-ruled. Objection, that it was not averred to be immemorably payable, over-ruled. Objection, that it was said to be raised and paid by the owners and occupiers, or some of them, over-ruled. Objections, that the *modus* being contributory, all persons liable to contribute, or called upon to pay the whole, should have been made parties; that the Attorney-General should have been a party; that the bill improperly prayed liberty to examine aged witnesses *de bene esse*, &c. and then prayed relief upon the same matters, over-ruled. * [1447]

Burton, Graham, Hollist and Bell, for the defendant, maintained that agistment is a mixed tithe. They considered predial tithes as those which are taken immediately from the ground, and relied much on the stat. 2 & 3 E. 6. c. 13. as proving that distinction. By that statute, all predial tithes are to be set out in their proper kind, on penalty of forfeiture of the double value; this presumes that all predial tithes are such as may be set out: agistment-tithe cannot. If it were the tithe of the grass, it would, when severed from the ground, be subject to the same rules as hay or any other tithe severed in any other way; but if hay or turnips pulled up are given to profitable cattle, as cows or sheep, two tithes are due; one for the hay on severance, the other for the increase of the cattle. So, if the grass agisted paid a tithe on severance, a second tithe would be due for the increase; but the law is otherwise: it cannot, therefore, be a tithe due for the grass on severance, but for the depasturing of the cattle; and the value of the grass is only the mode of ascertaining the value of the agistment.

The rule, that agistment-tithe shall be paid by the occupier, not by the owner of the cattle, is a mere rule of convenience. 1 *Roll's Abr.* 656. *Deg. p. 2. c. 5.* If it were a rule arising from the nature of the tithe, as due for the grass, and therefore payable by the owner of the grass, the same rule must hold as to commons; a commoner would not be liable to agistment-tithe, for the grass is not his; but the law is otherwise. *Burb.* 3. Animals reared for the plough or pail do not pay tithe when young; if the tenant changes his mind and sells them, agistment-tithe becomes due from the first: this must be for their eating. If it were tithe of the grass it would have been due immediately, and would not have depended on a future event. Accordingly, archbishop *Winchelsea*, in his Institutions, first considers the tithe of corn and other things clearly predial; he then treats of wool and other mixed tithes, then of pasturage, lastly of personal tithes, considering agistment-tithe as something between mixed and personal tithes; mixed, as being due, for the cattle; personal, as consisting of a money payment only. *Lindwood* 194. * treats it only "*tanquam prædialis*;" i. e. resembling predial tithes. *Watson* ranks it as a mixed tithe. (a)

They also argued, that the sum of 4s. 4d. for 20,000 acres of pasture land was so small that it could not possibly be meant to comprehend agistment-tithe.

The original bill being only for agistment-tithe, the cross-bill could not be filed to establish a *modus* for predial tithes, for no predial tithe has been demanded.

Macdonald, Chief Baron. — We are clearly satisfied that this is a predial, not a mixed tithe. The distinction is, that predial tithes

arise immediately from the soil; those are mixed which arise mediately, through the increase of animals. The arguments used on the part of the farmers prove in a satisfactory manner that agistment-tithe is the tithe of the grass eaten, and therefore it arises immediately from the soil. The mode in which the different sorts of tithes have been classed by writers upon the subject can have little weight in such a question; and the statute of *Ed. 6.*, so much relied on, does not seem intended to draw an accurate line between the different species of tithes. It affixes a penalty on not setting out predial tithes; that must be understood as relating to those only which are capable of being set out.

1796.

Scarr
v.
Trin. Coll.

The next question arose upon the description of the places for which the *modus* was claimed. One of the divisions was proved in evidence not to be a township or hamlet; but it was proved that the lands described in the bill by that name were known as a division or district of the parish, and the bounds were defined in evidence.

It was objected, that one who claims to establish a *modus* or other custom against general right, must define accurately and truly the place to be covered by it. The words "townships, hamlets, or districts of *A.*, *B.*, and *C.*" cannot be taken to mean that each of the three is a township, a hamlet, and a district; and if that were the meaning, it is disproved in evidence, as to one at least. If it is left indefinitely, as to each, that it is either a township, or a hamlet, or a district, this is bad. There may be a hamlet of *A.* and a district of *A.* For which is the *modus* claimed? Upon the face of the bill they may all be districts, and not townships or hamlets; one of them is so in fact. But, although a township or hamlet is a known legal definite quantity of lands, a district is not; as the bounds are not considered by the law as certain and definite, they must be defined by metes and bounds in laying the *modus*. *Scott v. Allgood*. Here not even the computed number of acres is set forth. The averment that these districts are distinguished by well-known boundaries and limits, cannot avail; in every case the setting out of boundaries might equally be dispensed with by an averment that they were well known.

Supra 1369:
[1448]

The Court thought the description sufficient. In that part of *Yorkshire*, consisting of extensive moors, the parishes are divided into certain districts, which are as well-known divisions as the parish itself; here the districts are stated to be distinguished by well known bounds; if that is true, as is proved in evidence to be the case, it seems perfectly useless to set out the limits in the bill.

Another objection was, that the *modus* was claimed for the owners and occupiers; whereas the owners, as such, could not claim a custom to be exempt from tithes, for none are due from them.

The objection was over-ruled.

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v.
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It was objected that the bill did not state the *modus* to be demandable at all; it only averred it to have been immemorially paid — not that it was immemorially payable. It may be, that the *modus* may now be found inconvenient to the farmers; there is no averment that it is mutually binding. It is said to have been raised and paid by the owners and occupiers, or some of them; this is no averment of a right to demand it against any one; the owners are not liable in common cases to pay a satisfaction for the tithes; there must be a specific averment, therefore, to make them liable to pay a satisfaction for the exemption of the occupiers from tithes.

To this it was answered, that the claim of exemption from payment of tithes in kind, or any other satisfaction for the same, than the sum of 4s. 4d., was an admission of that sum being due and payable. A sum payable as a *modus* for any tract of land, as an ancient farm, &c., is in its nature demandable from any occupier of any parcel of the place covered; an averment of its being so would be superfluous. It is stated to have been paid in fact by owners and occupiers, or some of them; that is, by some of them for themselves, and the rest all being liable. The introducing the “owners” as liable to it, may be understood only as referable to those owners who are liable to it from their situation, as being both the occupiers and owners of their lands; or, it may be understood, that both the owners and occupiers are liable, and the clergyman has double security for his demand. Owners may be liable. *Clarke v. Ord*,

Supra 1437.

Supra 275.

Cowper v. Andrews, *Hob.* 39.

The court over-ruled the objections.

[1449]

The averment that the sum due as a *modus* had been immemorially raised by way of contribution, was argued to be contradicted by the evidence. In fact no contribution had ever been made; the money was sometimes paid by a few farmers, more frequently raised out of the toll of a cattle-gate, to which the proprietors of the three districts were not all entitled, nor were the others exclusively the owners of it; at other times it was paid out of the profits of some quarries which belonged to a manor, of which the owners of lands in those districts were entitled to the profits.

It was insisted that the averment of payment by contribution, being introduced as a part of the *modus*, must be proved: the fact of contribution cannot be shewn in any instance, and the payment out of the cattle-gate, in particular, has no resemblance to a contribution among the tenants of these lands; it is a payment by other persons.

The Court thought the evidence sufficient to support the averment of a contribution. As between the rector and the farmer, the fact of payment alone is material, the contribution stated is not a part of the *modus* itself; it is not averred to be necessary that the

rector should call upon each farmer for his share, and take the risk of their general payments. He is entitled to call on any one for the whole; as between him and the tenants the satisfaction for tithes is then complete. The bill goes on to state how the one who has paid the whole shall be reimbursed by contribution; but contribution may be made in any manner the tenants may agree; and whether in fact it may in every case have been levied from all, in just proportions; or, whether the money of strangers may not have been mixed in the payment of this trifling sum, are questions of no moment, as between the rector and the tenants; being in its nature contributory, every payment must be referred to that nature, and is, as between the rector and the tenants, a payment by contribution. (a)

1796.
Scarr
v.
Trin. Coll.

The following objections were also taken to the form of the bill. That the *modus* being contributory, all persons who were liable to the contribution, or to be called upon for the whole by the rector, should have been made parties, so as to be bound by the decree.

That the rector, the college being an eleemosynary foundation of which the King is visitor, the Attorney General should have been a party.

That the bill was bad, as joining suits improperly. It prayed liberty to examine aged witnesses *de bene esse*, and that their testimony might be recorded, and then went on to pray relief in the [1450] same matter to which the examination of those witnesses went.

These objections were over-ruled.

An issue was directed to try the *modus*.

M. 37 Geo. III. A. D. 1796. Scac.

Potts v. Durant and others. [3 Anstr. 789.]

THE plaintiff claimed tithes as vicar of *Flixton* in *Suffolk*. He offered as evidence of his right, an instrument without a seal remaining, which purported to be an endowment, dated 1321, and another dated 1412, having a seal annexed, purporting to be an *insperimus* under the seal of the bishop of *Norwich*, and containing a copy of the former, which it stated to be then in the registry of the diocese. These two papers belonged to, and were produced by Mr. *Astle*, (the keeper of the records in the Tower, and himself a considerable collector of ancient MSS.) who had purchased them at the sale of the effects of the late Mr. *Martin*, an eminent collector. (b)

S. C.
4 Wood's
Decr. 592.
An instru-
ment pur-
porting to
be an en-
dowment,
without the
seal, and
another
purporting
to be an in-
sperimus
thereof un-
der the

(a) See *Chaytor v. Trin. Coll.*, Anstr. 841. MSS. through his wife, who was widow of Mr. *Leneve*, the keeper of the records of the Chapter-house, *Westminster*, in which many of the writings of the smaller monasteries are deposited; *infra* 1459. Bp. of *Hereford v. Cowper*, 3 Swanst. 158. n. *supra* 711.

(b) Mr. *Martin* obtained this and many other

1796.

Potts

v.

Durant.

seal of the
bishop, were
rejected as
coming out
of private
hands un-
connected
with the
matter in
dispute.

*[1451]

* *Supra*
1406.

† *Ibid.* n.

He also produced a record in the archdeacon's registry of that diocese, of the induction of a vicar in 1321 (a few months after the endowment) to the vicarage "*de novo ordinatam*." The augmentation-office and bishop's registry had been searched, but no endowment or copy of it could be found. The rectory belonged to the nunnery of *Flixton*, which was dissolved by 27 H. 8.

Burton, Partridge, and Alexander*, for the defendants, objected that this evidence was not admissible. An endowment is like a terrier, an ecclesiastical muniment, which ought by law to be kept in the registry of the diocese, and has its authenticity from being found in that repository. The copy kept by the nunnery ought to be in the augmentation-office. Unless the instrument comes from one of these offices, it is not entitled to be received as an endowment. *Atkins v. Hatton, *Miller v. Foster*.† So in the case of the *Chandos* peerage, the House of Lords rejected a piece of evidence coming from the *Ashmolean* museum. The production of the copy, verified under the seal of the ordinary, throws a suspicion on both. The only motive for taking such a copy, to be kept with the original, must have been that the original was defaced or worn out by length of time.

Graham, Plumer, and Fonblanque, on the other side. — The general inclination of the courts in modern times has been to consider objections to testimony as applying to the credit rather than the admissibility of the evidence. (a) In this case the credit of the instruments is unimpeachable. It is proved by the induction of the vicar, 1321, that there was an endowment then lately made, which is not found in any of the proper repositories. It is proved that this is of the hand-writing of that time; and it is impossible to shew an interest, either at that time or afterwards, in those persons, from whom Mr. *Astle* purchased, to fabricate a forgery.

Even a terrier may, by the determination of the court of King's Bench in *Miller v. Foster*, be received in evidence, although coming out of private custody. But the custody of a terrier is more nearly of the essence of the instrument; it becomes a terrier by being returned to the bishop. An endowment is like any other grant. The custody is immaterial, unless as a circumstance affecting the

hence it was suggested that they had originally come from that repository. These circumstances were stated by Mr. *Astle* to the court, on his being examined to prove the exhibits. After the decision of the court, rejecting the evidence, the counsel for the defendants pressed to have leave to exhibit interrogatories to prove the facts, and also to prove the seal to be the bishop's, and the deeds to be in the mode of writing used in the time they bore date, that these facts might appear on the record for the purpose of a rehearing or appeal. They insisted on the probability of Mr.

Lence having taken out these MSS. from the registry, and forgotten to restore them, or died before having an opportunity to do so: that this testimony had been before the court, and considered as facts in the cause, though not on the record, and that they ought therefore to be put in such a form as to have the same weight on rehearing or appeal. — The court thought the application to add to the record after the decree irregular, and it was refused accordingly.

(a) *Walton v. Shelley*, 1 Term Rep. 300. *R. v. Bray*, Rep. temp. Hard. 358.

credit of the evidence produced. The most suspicious of all custody is that of the party interested in the contents, yet all deeds and charters relating to private concerns are in that custody. The register of the diocese is the repository of ecclesiastical endowments, and other deeds, as the private charter-chest of an individual is expected to hold the muniments of his estate. Yet evidence adduced from other quarters may be good.

1796.

Potts
v.
Durant.

It is not true that the registry of each diocese contains all the muniments which properly ought to be lodged there; many are extremely defective, none perfect. There being no endowment of this vicarage found there, while it is clear one did exist, proves a deficiency in this case. The augmentation-office is still more imperfect. On the dissolution of the monasteries, few of them had any desire to preserve their muniments for the use of their plunderers. Many carried them to *Rome*, others suffered them to be dispersed in private hands; many of which have been saved and collected by the curiosity of individuals. If a man has lost a deed for any space of time, does it lose its authenticity by ever having been in the casual possession of a stranger? It must even be argued that a document which has ever been suffered to go out of the public custody, although afterwards restored, has for ever lost its claim to be admitted as evidence. In this case, the endowment's coming into private hands is accounted for, either from the history of the dissolution of the monasteries, or by supposing it to have been taken out of the registry by Mr. *Leneve*. [1452]

Supposing the original endowment not to be admissible, as not having a seal nor the authenticity derived from public custody, that will let in the *inspeximus* as evidence. It is a copy, and the original lost. The seal proves itself independent of all other circumstances. (a) Even a new grant from a corporation is so proved. The production of the first without a seal, which is the essence of a deed, explains the necessity of the convent obtaining from the bishop this confirmation of its existence.

The case of the *Chandos* peerage turned upon the nature of the paper produced: it was a pedigree made out by a stranger, who did not appear to have had any access to know the correct history

(a) The following note was found in the handwriting of Mr. *Martin*, out of whose possession the endowment was purchased by Mr. *Astle*.

"The Honourable James West, Esq. M.P. for St. Alban's, has the original deed, in which the abbot and convent of St. Edmund's Bury convey to St. Saviour's Hospital in Bury, two portions of tithes of the demesne of Herringwell in Suffolk. This deed was produced before the four Barons of the Exchequer on hearing the cause between

Burton, clerk, and *Holden*, esq. concerning the tithes of Herringwell-farm in 1756."

Upon referring to the minutes in the Exchequer-chamber book, 26th February 1756, it appears that a deed corresponding to the above description was read in evidence. (See 2 Wood's Decr. 524.)

Mr. West was a great antiquary and collector of curious MSS.

1796. of the family, and not recognized as authentic by being placed among their muniments.

Potts

v.

Durant.

*[1453]

*The case stood over for the opinion of the court on this point.

Macdonald, Chief Baron. — This cause has stood over for the court to deliberate on the admissibility of the two instruments produced by the plaintiff. The objection is, that they come out of the hands of a private person, instead of that repository which the law has allotted to such instruments. It was attempted to trace them from that repository, but we do not see sufficient probable testimony of that fact, and can only consider them as coming out of private custody. The present possessor bought them out of another private collection; we can trace them no further.

As the distinctions upon this subject are not very clearly defined, we have consulted with others of the judges how far the courts ought to go in admitting such testimony; and we are satisfied, that this is an attempt to go further than the courts ever have gone, or ought to go. The instruments come out of the custody of a private person, perfectly unconnected with the matters contained in them. In general, an ancient manuscript, the actual execution of which cannot now be otherwise proved, receives authenticity from its being found in that place in which such an instrument ought properly to be. It is true, that where a connection can be established, so as reasonably to account for the custody in which the instruments are found, the courts have somewhat relaxed the rule, and admitted them to be read, though not coming from exactly the most proper repository. In *Miller v. Foster*, I have reason to believe that the court of King's Bench, in granting a new trial, proceeded upon the ground of the connection between the terrier and the custody in which it was; and a strong corroborating circumstance in that case was, that the terrier was found annexed to an old lease of the prebend of nearly the same date. But, where the custody is merely private and wholly unconnected with the subject-matter, the courts have never gone the length of admitting such papers in evidence.

In the present case there are considerable circumstances to induce a belief of the authenticity of the instruments produced; the unimpeachable character of the gentleman by whom they are produced, the improbability of any person having had an interest to fabricate them, the appearance of the instruments themselves, and the corroboration given by the induction, which mentions an endowment to have been then lately granted, would probably be sufficient to convince any mind of their authenticity, if they could be received in evidence consistently with the rules of law.

A terrier
found in the

The plaintiff offered in evidence a terrier signed by the vicar

and inhabitants; it was found in the registry of the archdeacon of the diocese. 1796.

Burton objected, on behalf of the impropriate rector, (who was also proprietor of the greatest part of the parish), that this was not admissible, as not coming out of the proper repository.

The court said, that terriers were in fact often deposited there, and over-ruled the objection.

He then objected that the terrier was not evidence, as between the rector and vicar, in ascertaining the tithes of each. A terrier is an ecclesiastical instrument directed by the bishop to ascertain the glebe lands of the church, and the portions of tithes out of the parish. To that extent it has authenticity as a legal instrument. The tithes in the parish are not regularly included in it. They are indeed in practice always inserted, and the terrier becomes evidence between the vicar and the inhabitants, by being signed by both. As against the rector, he contended that it was not admissible on either ground.

Potts
v.
Durant.
archdeacon's registry, is admissible.

A terrier, although not signed by the impropriate rector, nor by any person for him, is evidence, against him as to tithes claimed by him in the parish.

He informed the court, however, that he recollected a case in which the same objection was made in this court while Lord Chief Baron *Skynner* presided in it: the court were divided in opinion, and came to no determination till after his resignation(a), when Lord Chief Baron *Eyre* and a majority of the court being in favour of the testimony, it was admitted.

The court over-ruled the objection.

The plaintiff proved that he was entitled to some tithes in kind, but a composition having been received by his predecessors for many years, it could not, through the negligence of all parties, be ascertained what tithes in particular were due to him.

The court directed an issue to try whether he was endowed of any and what tithes.

M. 37 Geo. III. A. D. 1796. Scac.

Woollaston and others v. *Wright* and others. [3 Anstr. 1801.]

THE liberty of *Shenton* in *Leicestershire* lies principally, if not wholly, in the parish of *Market Bosworth*. It contains about 1400 acres. The plaintiff *Woollaston* was lord of the liberty, and owner of the greatest part of it; the other plaintiffs were the tenants occupying his lands there. An immemorial payment had been made by the lord of the liberty to the rector of *Sibson*, in lieu [1455]

(a) In Mr. *Anstruther's* Report it is, "after his death:" but, as Sir *John Skynner* is still living, I have ventured to substitute the word "resignation" instead of "death." The candid reader, whilst he gladly admits the correction, will excuse the mistake. The learned Reporter might naturally think, that where no provisional compensation had been solicited, no terms, no conditions insisted upon, the vacancy must have been occasioned by death, not by voluntary cession. (Sir H. Gwill.)

1796.

Wollaston
v.*Wright.*

A bill will not lie to establish a *modus* which is not disputed. Two rectors claiming different things, the one tithes in kind, the other a *modus*, cannot be called upon to interplead.

of tithes of some part of the liberty to which he was entitled. There was evidence that the land tithable to the rector of *Sibson* was nineteen yards of land, about a third of the liberty. A money payment having been also made for many years to the rector of *Market Bosworth*, the locality of the lands tithable to each was in process of time forgotten. The rector of *Sibson* claimed his 7*l.* a year. The plaintiffs admitted his claim. The rector of *Market Bosworth* claimed, and sued for tithes of the whole liberty. The plaintiffs filed this bill, praying that the *modus* of 7*l.* might be established; that the rector of *Market Bosworth* and the rector of *Sibson* might interplead as to the tithes to be covered by the 7*l.* *modus*; and that a commission might issue to ascertain what lands in the liberty were within the parish or rectory of *Sibson*, and what within the other parish or rectory.

The rector of *Sibson* admitted, that he was only entitled to the *modus* in lieu of the tithes of lands in the liberty due to him.

Newnham, Burton, and Stanley, for the rector of *Market Bosworth*, took the following objections to the bill:

A commission to settle the boundaries of the parish, for the purposes of tithing, not granted.

1st, That a bill will not lie to establish a *modus* which is not disputed; the rector of *Sibson* claims nothing else. 2d, That the two rectors claiming different things, the one tithes in kind, the other a *modus*, could not be called upon to interplead. 3d, That the commission could not be granted. 4th, That the other owners of the lands in the liberty ought to have been parties.

Partridge, Phamer, and Sutton, for the plaintiffs. — The rector of *Market Bosworth* claims tithes of the whole liberty. If it is all in his parish, we are entitled to sue to establish a money payment to another ecclesiastical person as a discharge against the rector. If it is not in his parish, he has no interest in it, and cannot take the objection. The rector of *Sibson* does not object.

An interpleader lies where two persons claim the same right. The right in dispute is the tithes of a portion of the liberty; when that question is disposed of between the two rectors, the mode of payment, whether by *modus* or in kind, is a collateral circumstance not essential to the right.

[1456] Supposing it to be settled, that a commission cannot issue to settle the boundaries of parishes, for the purpose of tithing, yet the other part of the prayer may stand; we pray a commission to ascertain the boundaries of the parish or rectory. The rectory may not be co-extensive with the parish. If this is a portion of tithes of the rectory of *Sibson* in the parish of *Market Bosworth*, (as rather seems to be the case), a commission to ascertain the boundaries of the rectories can only affect the rights of the tithe-owners, without having any effect on the parochial rights. This will take it out of the case of *Atkins v. Hatton*.

As to the 4th objection, it appears that the *modus* is payable by the owner of the liberty, who is owner of most of the lands; as being the person who pays, the presumption is, that the lands covered by his payment are those which belong to him, stated in the bill. The law will not presume that he is paying for the exemption of other lands than his own.

1796.

Wollaston
v.
Wright

The court were of opinion for the defendant, on all the objections.

The bill was dismissed. (a)

M. 37 Geo. III. A.D. 1796. Scac.

Turner v. Williams. [3 Anstr. 829.]

THIS was a bill for tithes of the agistment of barren and unprofitable cattle. The defendant in his answer said nothing as to sheep, and his depositions also went only to other cattle depastured. The plaintiff proved that sheep had been agisted on the farm.

S.C.
4 Wood's
Decr. 503.
A bill for
agistment-
tithe ought
to demand
it for sheep
expressly,
for sheep
are not pre-
sumed to be
barren and
unprofit-
able.

Burton and *Thompson* objected, that by this loose mode of laying the demand, the defendant was entrapped into a belief that only great cattle were inquired after, and had directed his attention to them only. Although sheep are properly cattle, yet in common language they are seldom meant to be included in that general term. In suits for tithe of agistment, it is the universal practice to demand it for sheep expressly, and there is a good reason for it. Sheep are not supposed to be barren and unprofitable cattle: they always yield either lambs or at least wool; agistment-tithe can only be due where they are sold out of the parish before shearing time, [1457] so as to become unprofitable.

Plumer and *Richards* on the other side.

The court thought the defendant misled by the loose mode of laying the demand, and refused to direct an account as to the agistment of sheep. There being contradictory evidence as to agistment of other cattle, an issue was directed.

M. 37 Geo. III. A.D. 1796. Scac.

Wood v. Wray and others. [3 Anstr. 898.]

THE plaintiff, lessee of the rectory of *Aisgarth* in *Yorkshire*, under *Trinity College, Cambridge*, sued for several species of tithes,

S.C.
4 Wood's
Decr. 510.

(a) In *Easter* term following, the cause of *Wright v. Fox* came on to be argued. The plaintiff sued, as rector of *Market Bosworth*, for an account of tithe in kind of the lands held by the defendants in *Shenton*. They set up as a defence the payment of 7*l.* a year to the rector of *Sibson*, in lieu of tithes of some part of *Shenton*, and gave

evidence from terriers, land-tax assessments, &c. of the nature of the payment. The court (at the sittings after *Trinity* term) directed an issue, to try whether the payment of 7*l.* to the rector of *Sibson* is in lieu of the tithes of all or any part of the defendant's lands in *Shenton*. (4 Wood's Decr. 592.)

1796.

Wood

v.

Wray.

In describing the lands covered by a *modus*, there should be such a reasonable description of the lands covered by it, as would enable a sheriff to give possession of them.

more especially agistment-tithes. Two of the defendants, *Wray* and *Chapman*, answered jointly, setting up *moduses* to cover hay and agistment tithes. *Chapman* said he held as owner "certain lands withith the township of *T.* consisting of twenty acres, or thereabouts, and also of seven beast-gates or cattle-gates in certain open pastures there called *A.* and *B.*, together with common of pasture on the moors or commons within the township; which farm, lands, or grounds, were part of an ancient estate within the said township which theretofore belonged to *J. C.*; that the other part thereof consisted of eleven acres of meadow land, or thereabouts, and three beast-gates, or cattle-gates; and that the last-mentioned premises also belonged to the said defendant, but during the said years were let out to tenants." The answer then set forth that the said defendant held as owner "certain other lands there, consisting of twenty-seven acres, or thereabouts, which were parcel of an ancient estate within the said township which theretofore belonged to *W. A.*, the other part of which consisted of twenty-eight acres, or thereabouts." The description of the lands held by the defendant *Wray* was similar, being parcel of another ancient estate. They then set forth certain *moduses* payable for these ancient estates respectively. There was evidence to shew the extent and boundaries of the several ancient estates.

[1458] *Burton*, *Hollist*, and *Bell*, for the plaintiff, objected, that the description of the places covered by the *moduses* was not sufficiently certain. The ancient farms ought to have been set out by metes and bounds. Here even the name of each ancient farm is not given, nor the names of the owners or occupiers of the other parcels not held by these defendants.

Partridge, *Campbell*, and *Topham*, on the other side, insisted, that the description was sufficient in an answer where only the general nature of the defence is necessary to be set forth. The evidence supports that defence, and makes out the particular description required.

Macdonald, Chief Baron. — The question submitted to the court is, Whether the answer of the defendants has defined with reasonable precision the ancient estates in respect of which their several *moduses* are claimed? They have not given any description of the particular closes held by them, otherwise than as lands of certain extent; they do not name the parcels, nor describe their boundaries. It is impossible, therefore, upon this answer, to say which are the lands ascribed by them to each ancient estate, and covered by the *modus* attaching upon it. The description of the ancient estates, of which these lands are supposed to be parcel, is equally indefinite. They are not named nor described by boundaries, nor even by the names of the tenants of the other portions of those estates. All we

know of them is, that they lie in some part of the township of *T.*; but there is no clue to lead us to discover their particular locality. It is very true, that in an answer considerable indulgence is shewn in setting forth the defence, and the evidence here makes the case more intelligible; but the defendant is not to lie by in his answer, and give a blind description, which the plaintiff cannot meet. There must be such a reasonable precision in the description, as would enable a sheriff to give possession of the closes. Would this description be sufficient for that purpose? No issue could be directed upon this defence. The issue is in general in the words, or nearly in the words, of the answer; but here there is no description at all of the place covered by the *modus*. There is nothing therefore to try by an issue. Where there is an inaccuracy in the answer, in describing the defence, an indorsement on the *postea* may remedy the error: here the description is totally wanting; an indorsement therefore could not assist the case.

1796.

Wood
v.
Wray.

The defendants were decreed to account.

M. 37 Geo. III. A. D. 1796. Scac.

[1459]

Chaytor and others v. *Trinity College, Cambridge, and Wood.*

[3 Anstr. 841.]

WOOD, the lessee of the college, having sued for agistment tithe, this bill was to establish a *modus*. The plaintiffs filed it as owners and occupiers of lands within the township or district of *Thoresby* in the parish of *Aisgarth*, on behalf of themselves and the other owners and occupiers of lands in the said township; to establish a contributory payment of 6s. 8d. in lieu of all tithes of hay and agistment in the township. It appeared, in fact, that the whole township belonged to the plaintiff *Chaytor*, except two pieces which belonged to persons not parties.

S. C.
4 Wood's
Decr. 507.
One owner
of lands in
a township
may sue for
himself and
the others
to establish
a contribu-
tory *modus*
for all the
lands there.

Burton, Hollist, and Bell objected that this not being a parochial *modus*, but merely for a particular district, could not be supported by one for himself and the other proprietors, but all must be parties. The allowing one to sue for the rest is only in cases of a general right claimed by all the persons who stand in the same relation to the defendant, as the inhabitants of a parish against the rector, or the tenants of a manor against the lord. It is to save multiplicity of suits, arising from the whole parish or manor being interested.

They also argued that a contributory *modus* could not be the subject of such a suit. For the ground of allowing one to support the interests of all, is, that their rights are similar, and a multiplicity of similar suits is avoided by it. Here the rights are not similar, but there is the same joint right, and only one joint suit can be brought

1796. to establish the *modus*, in which all the persons interested must be parties.

Chaytor
v.
Trin. Coll.

They also objected to the description of the lands as a township or district; and that the boundaries were not defined in the bill by abutments, nor by the number of acres. In the evidence it appeared to be a township, and the boundaries were ascertained by the manors on which it abutted on each side. (a)

The court over-ruled the objections, and directed an issue to try the *modus*.

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[1460]

P. 37 Geo. III. A. D. 1797. Scac.

Hall v. Machet and others. [3 Anstr. 913.]

S.C.
4 Wood's
Decr. 524.
A water-
mill is tith-
able as a
predial and
local tithe
in respect
of the per-
son to whom
it is due,
but as a
personal
tithe in the
mode of
accounting.
The tithe of
the clear
profit being
only due,
the rent is
the first de-
duction;
and in the
case of a
new mill in
the occupa-
tion of the
owner, a
yearly value,
in the na-
ture of a
rent, is to
be set upon
it and de-
ducted.
A farmer
may cut
down a field
in any por-
tions most
convenient,

THIS was a bill for tithes. One of the defendants, *Kerryson*, had built a new water-mill a few years before the time for which the bill sought an account, at the expence of 820*l*. He lived in a neighbouring parish.

Plumer, *Stanley*, and *Grimwood*, for the defendant, argued that this was a personal tithe, and therefore due to the rector of the parish in which the defendant resided. 2 *Inst.* 621. 3 *Bulst.* 212. 1 *Roll. Rep.* 405. *Cro. Jac.* 523.* 4 *Mod.* 215.† *Dodson v. Oliver*, *Bumb.* 73.‡ *Chamberlayne v. Newte*, 1 *Eq. Ca. Abr.* 366. 9 *Vin.* 40. and 1 *Bro. P. C.* 157.§ *Carlton v. Brightwell*, 2 *P. Wms.* 462. *Donalt v. Lowther*, 2 *Barnard, K. B.* 336. Another necessary consequence of its being a personal tithe, and so recognized in all these cases, is, that only the tenth part of the clear profits is due for tithes. And in *Chamberlayne v. Newte* it is expressly decided that the charges of building the mill are in the first place to be deducted. Those charges not being yet repaid, no tithe will be due to either rector.

Partridge and *Bell*, for the plaintiff, contended that at least for the purpose of deciding to whom the tithe was due, it was a predial tithe, payable *rectori loci*. || *Gumley v. Falkingham*, 1 *Show. Rep.* 281. *Carth.* 215. 1 *Roll. Abr.* 641. The case of *Chamberlayne v. Newte*, only decides, as to the mode and extent of payment, that it shall be computed as personal tithes are. That it is not a personal tithe in respect of locality is clear from this, that a *modus* for land covers a mill erected thereon. 2 *Inst.* 490.¶ *Russel v. More*, 1 *Roll. Abr.* 651. ** *Talbot v. May*, 3 *Atk.* 18. †† *Gaches v. Haynes*, Exchequer, 18th Dec. 1783, and June 1784. That was a case where an exemption was claimed for the land, under an inclosure act, and the question was, whether a mill newly erected was covered by the exemption.

* Supra 354. † Supra 623. ‡ Supra 595. § Supra 676. || Supra 982.
¶ Supra 1257. ** Supra 782. †† Supra 1256.

(a) See *Scarr v. Trin. Coll.* Anstr. 760. *supra* 1445.

The court held that it was; that the tithe of mills was a predial tithe, in respect of locality, although payable as a personal tithe in point of quantity. (a)

*As to the deductions to be made, only the annual expences can be claimed as such in any personal tithe. The defendant being the owner of the mill, no rent is paid nor can be deducted. *Chamberlayne v. Newte* was the case of a tenant. (b)

The case stood over till this day.

Macdonald, Chief Baron.—The principle upon which the tithe of mills depends seems now clearly fixed by *Chamberlayne v. Newte*, and *Gaches v. Haynes*, and the other cases: it is now settled that it is to be considered as a predial tithe, so far as regards its locality, and the person to whom it is payable; but in the mode of payment it is to be treated as a personal tithe.

With regard to the deductions to be made before the plaintiff shall claim his proportion of the clear residue, considerable doubt has been raised. On the one hand it is said, very truly, that it would be an extreme hardship on the present incumbent, if the whole expences of building the mill were to be deducted out of the first profits, because that would probably take away his chance of ever being benefited by it. On the other hand, till some retribution is made for the original expence, we cannot begin to charge the miller with any thing as his clear profit.

If the mill were in the hands of a tenant, it would be a very plain case. The tenant's clear gain is what remains to him after payment of rent and other expences; and in *Chamberlayne v. Newte*, that must have been one of the deductions. Now, although this mill is in the hands of the owner, the same measure of justice is applicable to it as if it were in lease. It is capable of having an annual value or rent set upon it, and when that is ascertained, it may be deducted, as if it were rent actually paid. We shall therefore direct the Deputy Remembrancer to inquire and set an annual value or rent on the mill; and after deducting that rent, and other incidental expences of servants, &c., the defendant to account for the tithe of the clear profits.

Partridge suggested that the whole rent or annual value ought not to be deducted: rent of a mill is paid for two things, the water and the machinery; in many places the principal part of the rent arises from the value of the fall of water; that being the natural benefit arising from the freehold is most properly the subject of

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provided he sets out the tithe of all then cut down, before any is carried, and provided it be not done vexatiously.

*[1461]

(a) This case was mentioned by *Barton* (*amicus curiæ*), who was counsel in it for the miller; *Mansfield* was on the other side; it came on upon a motion for a new trial.

in that case the rent was allowed as a deduction, in taking the account before the Master; but nothing appeared in the record from which it could be ascertained.

(b) Searches were made, to discover whether

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tithes; the deduction ought only to be proportioned to the value of the machinery, as a recompence for the charges of erecting it.

The court thought that it was necessary to have one general rule for all cases; that the whole rent must be deducted, as an expence, in the case of a tenant, and the same measure ought to be adhered to in the case of the proprietor. (a)

Another point in the cause was this: One of the defendants occupying, among other lands, a piece of meadow of nine acres, cut it down at four several times, and set out the tithes of each cutting separately, as it was cut. He gave evidence that from the stocking of his farm, and other circumstances, particularly the danger of floods, this mode of husbandry was more convenient to him than to cut all at once. He gave notice to the plaintiff at each cutting.

For the plaintiff it was objected, that the cutting down so small a field at four cuttings could only be justified from absolute necessity, as it gave so much trouble to the clergyman.

Supra 961.

For the defendant was cited, *Erskine v. Ruffle*.

The court held the rule to be, that all the hay cut down in a field at any one time must be tithed before any part of it could be carried away; but the quantity to be cut at each time was in the discretion of the farmer, unless there should appear a design to defraud or vex the clergyman, under the pretext of convenience to himself. As the mode of husbandry in this case was fairly accounted for, they held it well enough. (b)

June 3. A.D. 1797. Dom. Proc.

Garnons v. Barnard.

S.C.

4 Wood's
Decr. 377.

Anstr. 296.

7 Bro.

P. C. 105.

(2d ed.)

The right to
compel an
account for
tithes being
consequen-
tial to the
legal title,
and a rector

IN *Michaelmas* term 1787, the plaintiff filed a bill, as vicar of the parish church of *South-Cave* in the county of *York*, in the court of Exchequer, against the defendant, both as occupier of lands within the parish aforesaid, and the tithable places thereof, and also as rector of the impropriate rectory of *South-Cave*, to compel payment of the tithe of agistment of sheep and lambs, and other barren and unprofitable cattle, fed and depastured upon the lands so occupied by the defendant, during the years 1786 and 1787; admitting by his bill that the defendant, as rector of the parish, was entitled to the tithes of hay and corn, wool and lamb, but claiming all agist-

(a) The court ordered the deputy to take an account of what was due from *M.K.* for the tithe of the clear yearly gains or profits, if any, at his said mill; and in order to ascertain such clear yearly gains and profits, the Deputy, in computing the same, was ordered to set a yearly value in the nature of a rent upon the said mill, and make an

allowance for the same, and to ascertain and make a reasonable allowance for servants' wages, repairs, and other expences and outgoings. 4 Wood's Decr. 530. See also *Manby v. Taylor*, 3 Ves. & Beam. 71. *infra*.

(b) But see *Leathes v. Levinson*, 12 East 239. *infra*.

ment tithe as vicar; and alleging generally his title by endowment, or otherwise.

The defendant by his answer to the plaintiff's bill, insisted that the plaintiff was not entitled to any agistment tithe, but that the defendant, as rector impropriate, was entitled to the tithe of agistment of sheep, and all other barren and unprofitable cattle fed and depastured within the said parish, and the tithable places thereof; and in support of such title, the defendant stated by his answer, that for a great number of years last past, one penny for each sheep, and one halfpenny for each lamb depastured within the said parish, and sold out after *Candlemas*, and before the next shearing time, had been paid to the rector impropriate of the parish, and that no payment had ever been made to the vicar for the tithe of agistment of sheep depastured within the said parish, or for any other barren or unprofitable cattle.

Issue being joined, and witnesses examined, publication passed, and the cause was set down for hearing, and was heard in *Trinity* term 1791.

In support of his right the plaintiff produced, 1st, An ancient survey of the prebend of *South Cave*, to which this rectory was appropriated, without date, but apparently of great antiquity, entitled "*Extenta prebende de South Cave*," entered in a manuscript book found in the registry of the dean and chapter of *York*, whereby it appeared what species of tithes belonged to the prebendary as rector and what to the vicar; stating the prebend of *South-Cave* to consist in predial and mixed tithes of the parish, and afterwards enumerating as belonging to the prebend, the predial tithes of the whole town of *Cave*, also the predial tithes of two carucates of land in the town of *Bromfleet*, and of two carucates of land in the town of *Faxflent* (being towns within *South-Cave*); and the tithes of hay from all the meadows within *Cave* and *Faxflent*, as well as of wool and lambs, from the feedings depastured throughout the said parish; and stating that the personal tithes, and those of flax and hemp, oblations, and mortuaries, and all small articles, belonged to the vicar. The following is a copy of this ancient survey:

"*Extenta prebende de Southcave.*

"Prebendar' de Southcave consistit in decimis pdialibus & mixtis de [1464]
pochia de Cave & poch' ecclie de Wadword & medietatis ecclie de
Otteley. Ad pochiã de Cave ptinent villa ejusdem & villa de
Brūghelflent Oxemerdiike & Faxflent in villa de Cave ptinent
pbende una carucata terre cū ptinent quam het in dnico & decime
pdiales totius ville & scdm extentū regiū pdce ville ptinēt quindecim
carucate tre itm decime pdiales dūar' carucat' tre in villa de Brūghel-

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having
prima facie
the title to
all the tithes
in him, in
questions
between the
rector and
the vicar, a
court of
equity
ought not
to make a
decree until
the title of
the vicar
has been
established
by the deci-
sion of a
jury; unless
such title is
made out in
the most
clear and
satisfactory
manner.

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fient & duar' carucat' tre in ville de Faxflent & decia Femi omu' ptor' de Cave & Faxflent lane & agnor' in pascuis pdce pochie se depastur' except' ombz templar' & domui Sçi Leonard Ebor' ptinentibz itm dicunt q pband' het in dicta pochia jurdiom ad correcões excessuum poch & itm delinquenciã faciẽd & eas audiend' & defminand' Itm decima pdial' uni' dimid' caruc' tre jux^u Wythelay ptinet pband' quã templar' nũc occupant & in pñenti non solvnt Itm decia cẽfũ acr' pti que templar' de novo sũt adquisiti & in pñenti de hiis nullam solvnt & sex acr' pti quas hospitalarii de novo occupaĩnt & nulla ex hiis deciam solvnt & dice acr' pti quas prior & convetus de Warĩa occupant & medietatẽ ejusdẽ decie solve confidicut & decia pti cujusdã Laur' de Faxflent quod nũc templarii occupant & nullam deciam inde solvt Item hõies manẽtes aqud Oxemdyke colunt octoginta & sex acr' & tres pti' pprs laboribz infra pochia pdcã & ecia nichil inde pcipit sed templarii deciam integ'lit' recipiũt que eor' sunt svi un' acjuvant'. Item decie psonales, & lini canobii oblacões & pncipalia decedent' & omnia minuta ptinent vicar injuste tn detinẽt' ab eodẽ decia cujusdã piscar infra pochiam situate & fixe sup feodo Sçi Leonardi & laycis ad firmam dimisse. Nullos hẽt tenentes apud Cave."

[1465] 2d, An entry in manuscript in *Bibl. Cotton. Claud. B. 3.* in the *British Museum*, entitled "*Registrum Cartarum Compositum Ecclesie Sancti Petri Eboraci a tempore Hen. Primi ad tempora Edwardi primi regis Anglie;*" containing a survey or *extenta prebende de South-Cave*, which agreed almost in words and in substance altogether with the former.

3d, The most ancient existing terrier of the revenues and ecclesiastical dues belonging to the vicarage of *South-Cave*, dated in the year 1716'; setting forth, that to this vicarage belong "all manner of tithes," (except corn and hay, wool and lamb) "and are paid as followeth, yearly, at *Easter*." And then proceeding to enumerate many species of tithes, and the mode of payment, but without mentioning agistment-tithe in particular. Several other terriers from the year 1716 to the year 1786, agreeing with the first, that to this vicarage belong all manner of tithes, except corn, hay, wool and lamb; but differing therefrom in the assertion 'that the tithes are paid as followeth yearly at *Easter*,' and, instead thereof, stating that 'they are or ought to be paid as they severally become due, but are generally paid at *Easter*, yearly.'

4th, The accounts of Mr. *Robinson*, a former vicar, from the year 1759 to the year 1782, whereby it appeared that he received all tithes except corn, hay, wool, and lamb, under the denominations following, hemp, line, mill, kiln, house, hens, eggs, offerings, foals,

ploughs, geese, turkies, ducks, dove-coat, chamber, cows, calves, orchards, gardens, close, rape, turnips, potatoes, clover and mustard-seeds, saintfoin, saintfoin-seeds, bees, pigs, seeds, &c. mentioning thirty instances at least of payments having been made to him for turnips, viz. thrice 10s. once 17s. once 1l. 10s. twice 5s. once 6s. the rest from 6d. to 1s.; for rape, 6l. 19s. 2d., 9l. 10s., 7l. 1s., 15s.; for rape, &c. 20l.; for clover, 10s. 6d.; for saintfoin 1l. 6s. 8d.; and for saintfoin-seed 3s.

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Parol evidence was also produced in support of the plaintiff's right, to prove that the vicar had received all tithes arising within the parish (except corn, hay, wool, and lamb, and also except one penny for each sheep, and one halfpenny for each lamb, sold out of the parish between *Candlemas* and the next shearing time, received by the rector impropriate); and that, in the idea of the parish, those payments of one penny and one halfpenny were for the tithe of wool and lamb, and not for agistment-tithe.

That before the inclosure of the open Fields within *South-Cave*, which took place in the year 1785, all the lands in the parish, (except a very few closes adjoining the town), were open common fields in tillage, affording little, if any, tithe of agistment; which was a tithe then scarcely known, but which, after such inclosure, became of great value. [1466]

That the cultivation of turnips within the parish was of modern introduction; the first growth in the old inclosures being from forty to fifty years, and in the open fields from twenty to thirty years before the suit.

That the manner of compounding with the vicar for the tithe of turnips, had been by his receiving from the owners and growers of the turnips, after the rate of two shillings in the pound, on the amount of money received for such turnips as happened to be sold or to be eaten on the ground; and after the rate of five shillings an acre, when the turnips were pulled and taken away by the owners or growers, or eaten with their unprofitable cattle after having been pulled.

It was observed by the plaintiff, that his written corresponded with his parol evidence, the result of the whole being, that all tithes within the parish belong to the vicar (except corn, hay, wool, and lamb), which are payable to the rector impropriate, or to some one claiming under him: accordingly, every new species of tithes introduced into the parish, has been received by the vicar. Instances of this are to be found in turnips, potatoes, rape, saintfoin, saintfoin and other seeds, &c. &c. &c. And that the actual payment of agistment-tithe, which had been entirely confined to the article of turnips, was all on one side, namely, in favour of the vicar, the plaintiff.

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The evidence adduced for the defendant consisted first of the bill and answers in a suit by a lessee of the rectory, wherein a former vicar was a defendant, against an occupier of lands, for agistment-tithe within the parish, in which no decree was made. Evidence was also given as to sums of one penny and one halfpenny collected by the rector, for sheep and lambs sold out of the parish after *Candlemas* and before shearing time, without ascribing these payments to the account of agistment-tithe.

It was contended that these payments were not made under that denomination, or for agistment-tithe; for the more valuable tithe of agistment arising from the other unprofitable cattle within the parish, nothing was ever rendered to the rector: the rule of the canon law, and ecclesiastical constitutions (the plaintiff observed) for [1467] apportioning wool in different parishes, serve to shew, that these payments were made for that species of tithe.

By canon 1305, *Si oves alibi æstate et alibi in hieme nutriuntur, dividenda est decima. — Vid. Cod. Jud. Eccl. 692.*

By a constitution of archbishop *Winchelsea*, tithes of wool shall be paid to the incumbent, in whose parish the sheep have remained constantly, from the time of shearing till *Martinmas*, though they be afterwards removed; and if they be removed within the said time, from parish to parish, each incumbent in whose parish they shall remain at least thirty days, shall have his proportion of the wool. *Lindw. 197.*

The evidence for the defendant and plaintiff the latter contended was consistent; agreeing, that (except as to the excepted articles, being corn, hay, wool and lamb), all the tithes within the parish belong to the vicar.

The defendant insisted, that the question to be first tried in the cause, was a mere question of title depending on facts. That by the receipt of the ancient payments of one penny for every sheep, and one halfpenny for every lamb, he, and those under whom he claimed, had been unquestionably, for a great length of time, if not immemorially, in possession of the tithes of agistment of sheep; and that the defendant ought not to be deprived of such possession, or his title to agistment-tithe in general impeached, except by the verdict of a jury, upon the facts evidencing the title, especially under these circumstances; and that it was the constant practice of courts of equity, under such circumstances, not to make any decree affecting the title, until the title had been decided upon at law.

The court of Exchequer, notwithstanding, on the 7th of *July* 1791, without any previous decision on the title at law, and without directing any issue to try the disputed fact of title, under the order of the court, decreed, that it should be referred to the Deputy

Remembrancer to take an account of the tithe of agistment demanded by the bill.

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The defendant, conceiving himself aggrieved by this decision, applied for a re-hearing of the cause; and accordingly, on the 6th day of *July* 1793, the cause was re-heard by the court of Exchequer, when the decree of the 7th of *July* 1791 was affirmed; and the Chief Baron *Macdonald*, as it is reported, delivered himself to the following effect:

In this case the plaintiff, as vicar of *South-Cave*, claims agistment-tithe. The defendant, considering himself as impropiator of the rectory, also claims it; and has insisted that he is entitled to an issue to ascertain the right to this species of tithe, and more particularly to agistment-tithe of sheep depastured in the parish. To determine whether we have sufficient grounds for a decree, without sending the question to be tried at law, it will be necessary to consider the evidence that is before the court.

1 Anstr.
319.

[1468]

It is very clear, that a rector is *primâ facie* entitled to the whole tithes; and the vicar can claim nothing unless he can shew an endowment, or some evidence from which an endowment must be inferred. Here the defendant also proves an ancient payment to him and his predecessors of one penny for every sheep, and an halfpenny for every lamb, brought into the parish after *Candlemas*, and sold out before shearing-time; and insists on this as a perception of agistment-tithe. The vicar shews a common money-payment made to the vicars for the last forty years for turnips; 5s. *per* acre for turnips pulled, and 2s. *per* acre for turnips eaten off the ground; and insists that the latter is to be considered as perception of agistment-tithe in his predecessors.

• Supra
711.

Payment of a composition for the tithes of turnips, whether pulled or eaten off the ground, where neither party considered it as an agistment-tithe, is no evidence of perception of that species of tithe. A *modus* of one penny for every sheep, and an half-penny for every lamb,

But it is clear, that this payment to the vicar was not made under the idea of being an agistment-tithe. All the witnesses who speak of it, say they know nothing of agistment-tithe, nor ever knew it paid; and *Robinson*, the former vicar, did not know of any such right: then this, which was not understood to be paid as agistment-tithe, cannot be considered as permanency of that species of tithe, but merely as proceeding from a confused notion of the right of the clergyman to some satisfaction for the turnips, of which, if pulled up, he would have received the tithes.

The ancient payment to the rector may be more naturally considered as a payment for the wool of the sheep and lambs sold out, than as an agistment-tithe. The halfpenny for lambs, in particular, can hardly be considered as such. The proper time to pay tithe of lambs is, when they can walk and feed. *Reynolds v. Vincent*, *Bunb.* 133. *Brinklow v. Edmonds*, * *Bunb.* 308. It would be highly unjust that lambs, when not eating, should pay half as much agistment-tithe as sheep; but the wool does bear that proportion:

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brought
into the pa-
rish after
Candlemas,
and sold
out before
shearing
time, is a
wool-mo-
dus, not an
agistment-
modus.

*[1469]

and in bishop *Winchelsea's* instructions, this very proportion is directed for the clergyman to observe in tithing wool. It is a common payment for the wool-tithe, but unknown as an agistment-modus. Every circumstance tends to prove that this is a composition for the wool on the backs of the sheep and lambs sold out of the parish; * and it therefore appears that there is no evidence of pertainancy of agistment-tithe on either side.

The vicar claims to be endowed of all small tithes, except wool and lamb. The first piece of evidence in support of this claim, is the *extenta prebendæ*, the date of which must have been before the year 1312, as it mentions the knights templars as then in possession of lands in the parish. It is material to observe, that in describing the claims of the prebendary in the parish of *South-Cave*, the extent does not say, that the rectory belongs to him, but only the predial tithes; and in the next parish, it expressly mentions the rectory itself as a part of the prebend. This difference of language raises a great doubt, whether in fact the rectory of *South-Cave* was annexed to the prebend. In describing the rights of the vicar, it uses the general words *omnia minuta*; and it has been argued, that this cannot mean all small tithes, for then it should have been in the feminine gender; but can only refer to the other small dues of the vicar: this construction is negatived by what immediately follows, *injuste tamen detinentur decimæ de piscaria de A*. Although all small tithes belong to the vicar, yet this particular small tithe is unjustly withheld from him. Then the words *omnia minuta* must refer to small tithes as well as other dues. This is strongly confirmed by the fact of the vicar's having constantly taken all new kinds of small tithes as they have been introduced into the parish. The progressive additions to their claims in the terriers, do away the idea of either the *extenta prebendæ*, or the terriers being meant to enumerate all the articles to which the vicars had a right.

The parol evidence gives no light upon the subject, except in confirming the evidence of the terriers as to some undisputed facts; and as the *extenta prebendæ* and the terriers appear to us sufficiently to prove the nature of the endowment, it is not probable that any material parol evidence can be given. Thus, in the case of *Barkley v. Walters*, 1 *Wils.* 170. parol evidence of enjoyment for fifty years contradictory to the written documents, was held merely to be a usurpation on the ancient right.

The defendant rests on his common law right as rector, but has not made out his title to that character: it is doubtful whether he is not a mere portionist of certain small tithes, and certainly he has had no enjoyment of small tithes, except wool and lamb. The *extenta prebendæ* sufficiently proves the nature of the endowment, and is strongly confirmed by the terriers. As the whole turns upon

written evidence, and the decree does not bind the right, we think, according to the determination of the case in *Wilson*, that an issue is unnecessary, and the decree ought to stand.

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The defendant thinking himself aggrieved by these decrees, appealed to the House of Lords, praying that the same might be reversed, and that the plaintiff's bill might be dismissed, or an issue might be directed to try at law the title of the plaintiff to the tithe of agistment, and especially his title to the tithe of agistment of sheep. And assigned the following reasons :

1. The right of a court of Equity to decree an account and payment of tithes, at the suit of a person claiming such tithes, must be grounded on a clear, unquestionable legal right to tithes in the plaintiff, or in some person in trust for him; the right to the account being merely consequential to the legal right to the tithes. The courts of Equity have therefore constantly made a distinction between those cases, in which the title of the plaintiff to the tithes claimed is not generally disputed; (as where it is objected only that the lands from which they are claimed are exempt, or discharged from payment of tithes; or, that the tithes claimed are not payable in kind, but are to be satisfied in some other manner, as by payment of a *modus*, or composition real;) and those cases, in which the title to the tithes claimed is denied to the plaintiff, and a title is set up in another person. In the first description of cases, the defendant claiming the benefit of an exemption, or discharge, or of a *modus* or real composition, acknowledges the original title of the plaintiff, as alleged by him, but qualifies that title either by an absolute discharge from payment of the tithes demanded, or by a right to satisfy that demand, otherwise than by payment of the tithes in kind.

Printed
Cases of
the Lords.

In the second description of cases, the existence of that title to the tithes in question, which the plaintiff claims, is absolutely and totally denied; and it is objected, that the title is in some other person: and in these cases, if the person in whom the title is thus stated, has had pernaney of the tithes claimed, the bill is in effect an ejectment bill, and ought to be treated like other bills in equity, which may be termed ejectment bills. In all cases where the legal title of the plaintiff has been disputed on bills, which may be properly called ejectment bills, it has not been the ordinary practice of courts of Equity to make any decree whatsoever, except for the purpose of assisting the trial of the title at law, where such assistance has been necessary; and this practice has been applied in many cases by the court of Exchequer itself to bills for tithes. In a case of *Scott v. Airey* and others, in *Trinity* term 1779, where a bill was filed by Dr. *Scott*, as rector of *Simonbourne*, claiming tithes of corn and hay against the defendants, several of whom

[1471]
Supra 1174.

1797. *Garnons v. Barnard.* were occupiers of lands within the parish, and the *Aireys* were owners of part of the lands, and claimed the tithe of corn and hay of their own lands, and of those occupied by the other defendants; and it appearing that the *Aireys*, and those under whom they claimed, had received the tithes in question, and made them the subject of settlement, for above 160 years, although they could shew no original lawful title to such tithes, the court of Exchequer dismissed the bill, refusing to give the rector any relief in equity, until he had established his title to the tithes at law. In *Supra 1177. Edwards v. Lord Vernon*, Hilary 1781, the court of Exchequer followed the authority of *Scott v. Airey*. And in *Mowbey v. Edmead*, in Hilary term 1784, sir Joseph Mowbey claiming as impropriate rector tithe of lands of which some of the defendants also claimed the tithes; it was objected that the plaintiff's title was a legal title, and that he must first demand it at law. The court of Exchequer said it was a question of title, the evidence of possession was doubtful, and a court of Equity would, therefore, not make any decree till the right had been settled at law, the account prayed being merely consequential to the right; and that the proper tribunal for trial of right, if the possession was equivocal, and for construction of deeds under which parties claimed, was a court of law. And although the counsel for the plaintiff pressed to have an issue directed, in order to have the right tried at law, with the assistance of the court, the court refused it and dismissed the bill.

These cases, which were all well considered, particularly that of *Scott v. Airey*, and were founded on more ancient authorities, as well as on the established principles of a court of Equity, seem to be a full authority for dismissing the bill in the present case. For in the present case, the question is a question of title, and the plaintiff is not in possession; he has not established his right at law; he cannot shew a clear legal right; the account prayed by his bill is merely consequential to the legal right; and therefore the trial of the legal right ought to be referred to the proper tribunal, a court of law, to which the plaintiff ought to have resorted before he filed his bill.

[1472] 2. Supposing the situation of the plaintiff to entitle him to the assistance of a court of Equity, notwithstanding he has not established his title at law, yet as the account prayed by the bill is, as observed by the court of Exchequer in *Mowbey v. Edmead*, merely consequential to the legal right, it is conceived that the utmost he could demand was the assistance of the court, to enable him to try that right at law; and that an account ought not to have been decreed till the right had been so tried at law, and found for the plaintiff. And the court under the circumstances, taking upon it-

self to decide upon a legal title resulting from disputed facts, seems to have confounded the distinctions hitherto established between the duties of courts of law and equity. This reasoning most strongly applies in the present case, for the plaintiff can have no title as vicar, but one derived out of the title of the rector. The original title, therefore, was in the rector, and must remain with him, and, consequently, must now be in the defendant, unless the vicar can shew a title against the rector by evidence of endowment, and by possession according to that endowment. If that is not shewn so clearly that there can be no possibility of doubt on the subject, it is conceived that the rector has a right to have the question of title discussed in a court of law on a trial by a jury. If a *modus*, or an exemption is set up by an owner or occupier of lands against a rector, it is considered as the established rule of courts of equity, that however clear the proof of the *modus* or exemption may be, and although such evidence may not be encountered by any evidence on the part of the rector, yet the rector has a right to have the question tried upon an issue before a jury, because he has a *prima facie* title as rector, against the owner and occupier of the land.

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It seems impossible to distinguish this case from that alluded to. The rector in this case having the original title, and that title remaining with him, unless taken from him by some legal means, he has a right to have it tried in a court of law, and by a jury. "Whether the title has been legally taken from him or not," before a court of Equity can decide that he has no title.

3. If there is any ground for the claim of a person having the original legal title, to have the question "Whether that legal title has been taken from him" decided by a trial in a court of law, before a court of Equity can make a decree, founded on no question of equity, but merely consequential to a legal title, in a case in which the evidence given in the court of Equity is apparently clear against him; it seems beyond a doubt that he has a right to have the question of title so tried, where the evidence in the court of Equity is so far from being apparently clear against him, that it is conceived the weight of evidence is in his favour. In the present case, the original right is with the defendant. As rector he is unquestionably entitled to the tithes in dispute, unless the plaintiff can shew that the vicar has been endowed with such tithes. The vicar might shew his title by producing the instrument of endowment, and shewing enjoyment conformable to that endowment; or by producing instruments amounting to evidence of endowment, and shewing conformable possession; or by shewing possession merely, from which an endowment might be presumed.

[1473]

The plaintiff has not produced any instrument of endowment: he has produced instruments which he alleges amount to evidence

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of endowment; namely, the extent of the prebend and the terriers; and he insists that these amount to evidence, that the vicar was endowed with all small tithes. This assertion is principally founded on the words "*omnia minuta*," towards the close of the extent. But those words cannot, according to the rules of grammar, or consistently with their position in the instrument, be deemed applicable to tithes of any description. They follow the words, "*oblaciones & principalia decedentium*," oblations and mortuaries; and therefore clearly refer to other minute profits of the church, and not to tithes. Besides, the first part of the same instrument states generally that the prebend consists (among other things) in the predial and mixed tithes of the parish of *Cave*; and the words which apply to the vicar, state his title to consist simply of personal tithes, and tithes of flax and hemp, oblations and mortuaries, "*et omnia minuta*;" adding, that the tithes of a fishery, (a personal tithe, *Lindwood* 195.) were detained from the vicar. This extent being within time of memory, the vicar could not prescribe for small tithes against the terms of it; and the enjoyment of the tithes in question certainly has not been with the vicar, to found a presumption of any such prescriptive right, if it could be set up. The terriers on which the vicar relies, specify the tithes which the vicar received from 1716, the date of the first terrier. This specification certainly gives to the vicar many articles of tithe to which he appears to have no title upon the extent; and his enjoyment has been accordingly. But, although it may therefore be fair to presume a subsequent endowment of those particular tithes, it is no ground for presuming an endowment of all small tithes; and in the specification in the terriers, the tithe of agistment is not comprized; and it is clear from the very specification in the terriers, that the vicar during all that period was not in the receipt of the tithe of agistment. On the contrary, in 1676, *Clark* as lessee of the rectory of *South-Cave*, filed a bill in the court of Exchequer, against *Sunderland* and others, occupiers of lands in the manor of *Bromfleet* within the parish, praying an account of the lands occupied by the defendants, and of corn, grain, and hay, grown on such lands, and of unprofitable cattle agisted there. The defendants stated a title under the dissolved monastery of *St. Leonard's* in *York*, (one of the greater monasteries,) and set up an exemption from tithes. It does not appear that this suit further proceeded; but it is clear from it that in 1676 the rector claimed the tithe of agistment as his general right, as rector; and that in the particular case his claim was answered, by setting up an exemption from payment of any tithes. In 1757, a bill was filed in the court of Exchequer by *Wilkinson* lessee of the rectory, against *Robinson*, then vicar, and *Newton*, a principal occupier, for agistment-tithe; and *Robinson*, in his answer

[1474]

to that bill, did not pretend that he, or any of his predecessors, had ever received agistment-tithe; nay, he did not venture to swear he believed he was entitled to it; and on the contrary said "he did not know, nor was able to set forth, whether he was entitled to any tithe of agistment, or whether he had any right or title thereto; but submitted the same to the court." Yet this is the very man, who according to the evidence of one of the witnesses in the present cause was contriving evidence of title for the benefit of his successors, and therefore not likely to forbear setting up any claim he thought he could support. There appears, therefore, on the evidence, no ground for presuming any endowment of tithe of agistment, either from any written instrument, or from any possession; and on the contrary, the presumption from possession is, that the vicar was not so endowed. For the payments of one penny for every sheep, and a halfpenny for every lamb, depastured within the parish and sold out after *Candlemas*, and before the next shearing time, to the rector, were proved by several witnesses to have been immemorially made to the rector; and the fact of those payments was not disputed by the vicar. It was therefore clear that the rector was, and constantly had been in possession of the tithes of agistment of sheep and lambs under such circumstances; as those payments so immemorially made could not be good in law, but as payment for the tithe of agistment of such sheep and lambs.

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This evidence therefore on the part of the defendant completely negatived the vicar's claim to the tithe of agistment of sheep and lambs within the parish, by proving immemorial enjoyment in contradiction to that claim. Consequently, it was impossible to establish the title of the vicar, but by production of an actual endowment, and proving such circumstances as must oust any presumption, that the title under such endowment might be subsequently varied, as by law it might. This was therefore a question, which if not decided in favour of the defendant, ought to have been tried by a jury; and accordingly in the case of *Carr*, vicar of *Lowesby*, against *Henton* and others, the court of Exchequer upon the original hearing in *June* 1784, directed an issue to try the title of the vicar to small tithes, where it appeared by evidence, that the vicar had been expressly endowed with all small tithes; but there was also evidence of subsequent payment of a pension by the rector to the vicar; and it appeared that the question upon the vicar's title had been long matter of litigation between the rector and vicar, although there had been actually an ancient decree in 15 C. 1. in favour of the vicar's title founded upon the clear evidence of the endowment. This order, directing an issue, was reheard, and the decree affirmed in the court of Exchequer, and afterwards again

[1475]

Supra 1258.

1797. affirmed on appeal by your Lordships, on the fifth day of *March* 1788.

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4. Upon the bill filed in the court of Exchequer by *Wilkinson* against *Robinson* and *Newton* before stated, it is conceived if the cause had come to a hearing, and no other evidence had been offered than that given in the present case, the utmost the court could have done for the vicar (according to the ordinary practice) would have been to direct an issue to try whether the tithe in question belonged to the rector or vicar, as the rector had a clear *prima facie* title; and certainly there would have been no pretence in that case for dismissing the bill of the lessee of the rector, who claimed under the original legal title. If therefore in 1757 such must have been the proceedings on *Wilkinson's* title, the subsequent transactions, so far from bettering the title of the vicar, appear to support that of the rector; that cause having been compromised by *Newton* with the plaintiff, and the rector having constantly continued to receive the payments of one penny for sheep and a halfpenny for lambs; and it seems difficult to assign a reason for refusing in 1791 to try that question by a jury, which in 1757 must have been, it is presumed, tried by a jury.

[1476] 5. The propriety in this case of trying the title at law is more evident, because the circumstances and situation of the parish, the alterations made by inclosures, by change in the mode of agriculture, and a variety of other circumstances, may considerably affect any presumption, which might be raised as to the title of either party; because the question between the parties is solely a question of fact, upon a matter of title, and that a legal not an equitable title; the account prayed by the bill being merely an incident to a legal title to the tithes: because the effect of the decree is to dispossess the defendant, who is actually in possession of the tithe of agistment of sheep and lambs, and to deprive him of that which he has unquestionably purchased for a valuable consideration, namely, the penny for sheep, and a halfpenny for lambs, of which the person of whom he purchased was in possession, and to which he can sustain no title whatsoever against any occupier in the parish, if the decree of the court of Exchequer is right; notwithstanding he, and those under whom he claims, have immemorially received such payments without any pretence whatsoever by the vicar, that such payments ought to have been made to the vicar, and not to the rector. The impropriety of refusing to permit this question to be thus tried at law, likewise appears more glaring, because if the vicar shall file his bill for payment of tithes of agistment for sheep and lambs, the occupiers will either be deprived of the benefit of payments, which they had a right to insist upon against the rector, as immemorial

payments by way of *modus*, in lieu of agistment-tithe for sheep and lambs, or they must allege the payments to have been immemorially made to the rector by mistake, and that in fact they were due to the vicar although never received by him. The defendant, also, as an occupier, is deprived of this defence, which he might as an occupier have insisted upon against the claim of the vicar, if the vicar had clearly been endowed with agistment-tithe.

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6. The answers attempted to be given to these objections to the vicar's title, were—

1st. That the payments for sheep and lambs were not payments for agistment, but for wool: this sort of reasoning appears very extraordinary. The payments were unquestionably made, because the sheep and lambs, for which they were made, did not produce wool, nor were otherwise profitable to the rector; and that is the foundation of claim of agistment for sheep and lambs in any case. For if they had produced wool, or were otherwise profitable to the rector, there could have been no ground for claiming tithe of agistment, either by rector or vicar. Accordingly in a cause in the Exchequer, in *Trinity* term 1776, of *Bennett* impropriate rector of *Sutton* in *Lincolnshire*, against *Greaves* the vicar, and *Allenby* and others, occupiers of lands(a); evidence of the like immemorial payments to the vicar for sheep, viz. of 3d. a head for all sheep which had either been sheared in the preceding year in the parish, or brought into the parish before *Candlemas*, in any year, and were sold, or removed out of the parish before the next shearing time, were holden to be evidence, that the vicar was entitled by endowment to tithe of agistment generally; the court being of opinion that such payment was evidence of possession by the vicar of tithe of agistment of sheep and lambs. But in that case, notwithstanding such evidence, the court conceived the rector had a right to have the legal title tried at law, and directed an issue accordingly, which was found against the rector, and for the vicar; the ancient immemorial payments for sheep depastured and not shorn within the parish, being the principal evidence of the vicar's title to agistment-tithe. [1477]

2dly, It was insisted that the vicar, appearing to be in possession of most of the small tithes, it ought to be presumed he was endowed with all of which the rector did not appear to be in possession.

This seems a very extraordinary mode of reasoning, and particularly when applied to a tithe, of which (if the payments of one penny for sheep, and one halfpenny for lambs, were for agistment) the rector was clearly partly in possession, and it seems perfectly inap-

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plicable, and it is presumed never has been, in fact, applied to any case in which the rector is in possession of any small tithe, as the rector, in the present case, is of wool and lamb, which he has constantly received. At the utmost, it can apply only to cases, in which the rector had received nothing but great tithes, and the vicar had constantly received all the small tithes actually produced within the parish; and upon introduction of any new article, of which the tithe is a small tithe, the vicar claimed it, and produced his receipt of all small tithes before arising in the parish, as a ground for presuming that he was endowed with all small tithes whatsoever. But even in such case, the evidence being ground for presumption, seems matter properly to be left to a jury; more especially, as it is presumption made against a person having the common law right to the property in dispute. It is sufficiently disputable, whether the decisions of the court of Exchequer, which have holden the vicar entitled to newly introduced small tithes, although the rector has received them from the time of their introduction, because the vicar had received all other small tithes actually rendered within the parish, can be maintained upon just principles; [1478] resting as they do, upon the court's presuming a fact against a *prima facie* common law right; but the foundation of the presumption wholly fails in cases in which the rector has actually received small tithes, because that circumstance proves, that the vicar cannot have been endowed of all small tithes; and the common law right being in favour of the rector, the vicar cannot, against that common law right, claim a species of small tithes which he never has enjoyed. If in a parish where the rector enjoys some small tithes, the vicar should have been permitted to receive the small tithes of articles lately introduced into the parish, or small tithes which had for the first time been but lately demanded in the parish, though constantly produced in it, the very same principle upon which the court of Exchequer has in other cases ventured to presume as a fact, without the intervention of a jury, that a rector had received by mistake such small tithes, where the vicar (his endowment not appearing) has been used to receive all other small tithes, would, it is apprehended, require the court to hold that in such a case the vicar had been permitted by a like mistake to receive to the prejudice of the rector such small tithes. It is most abundantly clear that that principle could not possibly in such a case support a presumption in favour of the vicar.

3dly, It was urged, that the decree for the vicar would not bind the right of the rector, and therefore it was not necessary for the court to direct an issue.

This sort of reasoning also seems extraordinary. The decree does in effect bind the right of the defendant; and the court might,

in like manner, annually, for ever, make similar decrees, without directing any issue to try the fact of title, upon the allegation, that no one of such decrees actually bound the right. The distinction thus set up between decrees binding the right, and decrees not binding the right, has been hitherto considered as confined to a very different case, namely, where a defendant sets up a defence by way of *modus* to a bill for tithes, which prayed an establishment of the right, as well as an account; and the defendant in his answer has made some mistake in laying the *modus*, so that the court could not, upon those pleadings, direct an issue. There, the court, unable to direct an issue for want of sufficient matter on the record, has made a decree for an account only, to give the defendant an opportunity of trying his title upon a future suit. But that is on a supposition, that in a future suit the defendant may be able to put upon the record the *modus* in question, by which he may qualify the plaintiff's title, so that it may be tried: whereas, in the present case, it is for the plaintiff to state upon the record his title in derogation of the defendant's title, and to prove such title fully and clearly. For a vicar, it is conceived, is as much bound to make out his title against that of his rector by pleading and by evidence, as an occupier is to make out the exemption or qualification which he claims against the *prima facie* title of a rector or a vicar.

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The plaintiff on his part stated the following reason for the affirmance of the decrees complained of.

Respond-
ent's rea-
sons.

1. The *Extenta prebendæ*, terriers, vicar's accounts, &c. &c. independently of usage, prove that the vicar is endowed of all small tithes, and even of all other tithes within the parish, except corn, hay, wool, and lamb.

2. Wherever the usage is, that certain specific tithes have been received by the rector, and the rest of the tithes in general by the vicar, all new tithes which may arise will belong to the vicar: hops, clover, madder, turnips, agistment, and other species of new crops, are instances of it. Here, the usage is, that the vicar has been in receipt of all small tithes and of all tithes, other than those specifically excepted in the terriers. Consistently too with the rule of law, potatoes, turnips, rape, saintfoin, and saintfoin-seed, seeds of different sorts, and other articles, which are new species of tithes in this parish, have been received by the vicar. The tithe of agistment itself, where it has been rendered at all, as in the case of turnips consumed by unprofitable cattle, without being first pulled, has been paid to the vicar.

To the objection that " of common right all tithes belong to the rector; therefore the title to tithe-agistment, *prima facie*, is with the rector; that the rector has also been in the actual receipt of

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one-penny and one halfpenny for sheep and lambs, when no tithe of wool or lamb is payable; and that the payment of these sums could not be rightfully made for any thing else than the tithe of agistment;" the following answer was given :

[1480] By endowment, or by usage, the common law right of the rector may be qualified or abridged. In general, the great tithes belong to the rector, the small ones to the vicar, but often with the exception of lamb and wool, in favour of the rector; and the natural construction of the instruments evidencing the endowment, and the import of the usage in this case, shew that such was the division in this parish. As to the payments of one penny and one halfpenny for the sheep and lambs, it never was nor is the idea of the parish, that they are in the nature of agistment-tithe : no agistment-tithe, though much more valuable, for other unprofitable cattle, has ever been received by the rector. The rule of the canon law and the ecclesiastical constitutions as above-mentioned, afford a clue to the origin of these payments. The testimony of the witnesses also concurs, that the payments were for wool-tithe; and though they have been rendered for sheep resting in the parish fewer than thirty days, as well as more, notwithstanding the ecclesiastical constitution gave no portion of the tithe-wool in respect of less than thirty days pasturage, yet it is to be observed, that these were compositions in nature of a rate-tithe on the wool shorn out of the parish incapable of being collected in kind. To avoid frauds and disputes concerning what sheep were subject, and what exempt, an average rule is formed on the whole, whereby less is accepted for sheep, which for length of keeping ought to pay more, in consideration of receiving something for those which, from speedy removal, ought not to pay any thing for tithe-wool.

To the objection stated by the plaintiff in the following terms : " The written instruments are contradicted by the actual enjoyment of tithes; and the plaintiff's right is unsupported by written documents, or usage. According to the *extenta prebendæ* predial and mixed tithes belong to the rectory, small tithes to the vicarage; whereas, the vicar has been in the constant receipt of hemp, flax, &c. &c. which are predial tithes, and the rector has been in the uninterrupted enjoyment of wool and lamb, which are small tithes. —" By the terriers, " to the vicarage belong all tithes," (except corn, hay, wool, and lamb) and are mentioned to be paid in the order following, with an enumeration of several particulars. The general precedent words ought to be restrained by the latter specific ones. In the enumeration of particulars, tithe of agistment is not mentioned; the usage has not been to receive it; therefore it ought not to belong to the vicar. — It was answered :

The written instruments are reconcileable with the modern

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usage. By the *extenta prebendæ*, the prebend or rectory is said to consist in predial and mixed tithes, not of the predial and mixed tithes within the parish; and in fact at this day it enjoys many, though not all predial tithes. So when, lastly, all small tithes, or rather small articles, *omnia minuta*, are said to belong to the vicarage, they must be understood with an exception of those species of small tithes, which are before enumerated as belonging to the rectory, and which in truth were always articles of great value.

The usage perfectly concurs with this construction; and both instrument and parol evidence shew, that the impropraitor was never entitled nor ever received other species of small tithes than those which are specifically stated to have belonged to him. As to the terriers, the declaration contained in them, that to the vicarage belong all manner of tithes except corn, hay, wool, and lamb, is expressive of the vicar's right; the enumeration or description of particulars relates to the mode of tithing such articles as were then received by the vicar. These latter words, indicative of the temporary receipt, cannot restrain the general precedent words, disclosing the perpetual right of the vicarage.

To the last objection, That the plaintiff's title to agistment-tithe being doubtful, and resting on facts in dispute between the parties, ought to have had the sanction of a jury in the most solemn manner by a trial at law, before pronouncing a decree in equity to establish it; it was very shortly urged,

That the rules of all courts require, that facts should be ascertained before the law is declared. References from equity proceed not of right, but of discretion, to satisfy the conscience of the court concerning doubts in facts or law. In doubts of facts an issue is directed; doubts of law are referred to the judges. When the conscience of the court is satisfied both on the fact and on the law, a trial can have no other object than to create expence and accumulate oppression.

But, after hearing counsel, it was ordered and adjudged, that the decrees complained of be reversed; and, it was further ordered, that the court of Exchequer do direct a trial to be had at the then next assizes for the county of *York* upon the following issue: "Whether the vicar be entitled, by endowment or otherwise, to the tithe of agistment within the parish of *South-Cave*:" and that all further directions be reserved till after the trial; and that the court of Exchequer do give proper directions for carrying this judgement into execution.

Decree reversed,
MSS.
Journal,
sub. an.
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Accordingly a trial was had upon the issue, and the jury found a verdict for the plaintiff *Garnons*; whereupon an account was

4 Wood's
Decr. 379.

1797. decreed by the court of Exchequer, with the costs at law, but not in equity. (a)

[1482]

Tr. 37 Geo. III. A.D. 1797. Scac.

Chapman v. Beard. [3 Anstr. 942.]

S.C.
4 Wood's
Decr. 535.
Fifteen
years pos-
session of a
benefice is
prima facie
evidence of
a regular
induction,
and of
reading the
thirty-nine
articles.
Payment of
tithes by the
defendant,
a parish-
ioner, is
prima facie
evidence
against him
of the rec-
tor's title.

THIS was a suit for tithes. — The defendant in his answer denied the title of the rector, and insisted that he had not been regularly inducted, and that he had not read the thirty-nine articles. The plaintiff had been fifteen years in possession, and had received tithes from the defendant. No evidence was given of any ceremony of actual induction having taken place; but it was proved that upon the plaintiff's taking possession of the benefice, the bells were rung by his order. The defendant's witnesses severally proved, that they had generally attended divine service for the two months immediately after the plaintiff's becoming rector, and that none of them had heard him read the thirty-nine articles, or had heard of his reading them. No evidence was given that he had ever read them. The defendant had paid tithes to the plaintiff for several years.

Richards and *Short*, for the plaintiff, relied on *Bevan qui tam v. Williams*, 3 Term Rep. 635. (a) *Monke v. Butter*, 1 Rol. Rep. 83. *Watson's Cl. Law*, 652. *Gibs.* 817.

Romilly and *Benyon* on the other side. — Induction is a necessary part of the title of the plaintiff, and is the seisin at common law. Possession without it is tortious and voidable; the plaintiff therefore must prove it. *Buller's Ni. Pri.* 105. and the cases there cited. 1 *Sid.* 220, &c. The particular form is not material; but, unless the archdeacon, or other ecclesiastical officer, has given corporal possession of the benefice, there is no title.

In the case of *Powel v. Milbank*, 3 *Wils.* 355. it was solemnly settled that the having read the thirty-nine articles by a parson is presumed, unless evidence is adduced to destroy that presumption. It is impossible for the defendant to prove the negative, that the plaintiff never did read the articles; but evidence of several persons regularly attending church, during the first two months, and who did not hear him do so, throws upon him the necessity of proving the fact.

[1483]

Macdonald, Chief Baron. — It is a very singular attempt, after fifteen years' possession, acquiesced in by the defendant himself, to require the rector now to prove the fact of his induction. There is no regular ceremony required for that purpose, and there is

(a) On the question of issues between rector and vicar, see *Parsons v. Bellamy*, 4 *Pri.* 220. *infra.* *Dorman v. Cherry*, 4 *Pri.* 114. *infra.*

therefore no presumption of any evidence of it now existing. There is indeed proof of some formal seisin having been taken, by the ringing of bells and the like; but the best evidence of induction at such a distance of time is the possession for fifteen years under it.

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As to the other point, I perfectly agree to the rule laid down by Ch. J. *De Grey*. But here you shew no evidence to shake the legal presumption in favour of the incumbent. No doubt is raised. You have not shewn that any witnesses attended all divine service on each Lord's day for two months after the plaintiff's induction, and deny his having read the articles during that time. The circumstance of these witnesses not having heard him do so on those days when they happened to attend, is nothing, unless you can answer for each time that divine service was performed in the two months.

Hotham, Baron.—There is a strong presumption of both the facts in dispute, from the acquiescence of the parishioners and of the defendant. If there is any want of title, they should have complained to the bishop, or disputed it, while the memory of the thing was fresh. There is no record nor repository for the evidence of induction, or of reading the articles; and the witnesses cannot live for ever. If these facts are not to be presumed from length of time, that circumstance which strengthens all other titles will serve to weaken or destroy this.

Thompson, Baron.—The circumstance of having himself paid tithes to the plaintiff is *prima facie* evidence of the title against the defendant. It was so laid down by Lord *Kenyon* and *Buller* Justice, in *Radford v. Mackintosh*, 3 Term Rep. 635. and confirmed by the case there cited. I perfectly agree in the doctrine there holden.

The defendant was decreed to account with costs. (a)

Tr. 37 Geo. III. A.D. 1797. Scac.

[1484]

Lord Petre v. Blencoe and others. [3 Anstr. 945.]

THE plaintiff, as impropriate rector, claimed tithe in kind of the defendants' lands in the parish of *Mountnessing*, or *Gynge Mountney*, in *Essex*, being the demesne lands of an ancient monastery, of the *Augustine* order, of *St. Leonard of Thoby*. The defendants claimed to hold exempt from tithes. The monastery of *St. Leonard* was situated within the present boundaries of the parish, and the rectory had from a very early period been annexed to it. It was dissolved in 1524, by a bull from the pope, and all the possessions

S.C.
4 Wood's
Decr. 593.
Immemo-
rial non-
payment of
any tithes
from a dis-
trict cannot
raise a pre-
sumption of
an exemp-

(a) See also *Harris v. Adge*, *supra* 560. *Woodcock v. Smith*, Bun. 25.

1797. *Lord Petre v. Blencoe.* vested in the crown. In 17 H. 8. that king granted to cardinal *Wolsey* the manors and lands of *Thoby* and *Gynge Mounteney*, and also the rectory of *Gynge Mounteney*; after his attainure, the manor of *Thoby* was granted in 22 H. 8. to sir *R. Page* for life; and in 31 H. 8. the same subjects were granted, in reversion, to one *Berners*, under whom the defendants derived title; the grant included the site of the priory, with the church of *St. Leonard of Thoby*, the belfry, church-yard, &c. (not mentioning tithes), with all other lands and hereditaments of the monastery in *Thoby*. In 30 H. 8. the rectory of *Gynge Mounteney* was granted for twenty-one years to one *H. Wentworth*, including the "tithes of the demesne lands of the late monastery." In 37 H. 8. the rectory was granted to the plaintiff's ancestor, including "all the tithes of the demesne lands of the same priory in *Gynge Mounteney*, late in the tenure of *H. Wentworth*." No tithes were in fact ever paid for the demesne lands now in question, which were of very considerable extent. Another part of the same demesne lands of *Thoby* had been decreed to pay tithes in a suit in this court in 1739; the only defence there set up having been the unity of possession of the tithes and land in the hands of the monastery. Tithes had been paid for that farm ever since.

tion by grant from the lay-rector; but is strong evidence to explain the extent of the grant of the rectory, if at all doubtful.

The defendants rested their claim of exemption on several grounds.

1st, That after such a length of non-claim, while the rectory was in the hands of laymen, a conveyance ought to be presumed.

[1485] 2d, That the district of *St. Leonard of Thoby* was not parcel of the parish of *Gynge Mounteney*, but annexed to the church of *St. Leonard*, either as a separate parish, or as an extra-parochial chapelry.

3d, That the tithes of the demesnes of *Thoby* were vested in the monastery by some title distinct from the rectory, and therefore were not conveyed to the plaintiff.

It was proved that the lands in question were now considered as lying within the parish of *Gynge Mounteney* (a), and there was no trace of their having ever been otherwise, or of the existence of any parish or chapelry of *Thoby*, except from the mention of the church of *St. Leonard of Thoby*.

It was not clearly ascertained whether the monastery ever had any demesnes in the parish, as belonging to a manor of *Gynge Mounteney*, distinct from the lands in question, the demesnes of the manor of *Thoby*.

(a) In proving the parochiality of the demesnes of *Thoby*, some of the witnesses, whose depositions were read, appeared to be parishioners of *Gynge Mounteney*.

Romilly objected, that they were interested in

the parochiality of these lands on account of the contribution to parish rates, and therefore not admissible to move the fact. The court held them admissible, not being interested in the subject of this suit.

Burton and Pigott, for the plaintiff.—The parish must be supposed to have always been of the same extent as at present, unless some evidence is shewn to the contrary. The common law right of the rector must be presumed to cover the whole parish; and when we find him or his predecessors, the monastery, enjoying the tithes of the whole, it must be referred to that general title, unless some particular distinct title to any portion be clearly established.

The existence of the church of *St. Leonard* is accounted for as a necessary appendage to the monastery, and does not afford any presumption of a distinct parish or chapelry.

The circumstance of the grant to the plaintiff conveying tithes of the demesnes of the convent in *Gynge Mounteney*, distinct from the general grant of the rectory, is naturally accounted for from the unity of possession till then in the hands of the monastery, of cardinal *Wolsey*, and of the crown. When the tithes came first to be divided from the land, and capable of a separate perception, the grant, to prevent all doubts, has expressly mentioned them. There is therefore no fair inference that the monastery held these tithes by a title distinct from that to the rectory.

But supposing such an inference to arise, then, if the demesnes of the monastery in *Gynge Mounteney*, mentioned in the plaintiff's grant, mean the demesnes of *Thoby*, as lying within the parish, the tithes of those demesnes, the subject of dispute, are expressly granted to us. If the demesnes of *Thoby* are different from those mentioned in the grant, then the presumption of a distinct title to the tithes does not extend to them.

The conveyance to the defendant of the church, church-yard, belfry, &c. all connected with the church of *St. Leonard*, without mentioning the tithes, negatives any idea of these having been conveyed to him; and there is no evidence of any conveyances or transmission of the tithes of the demesnes, as a property in the defendant's family, distinct from the land.

If any such right ever existed, it could not merge, and the defendant *Blencoe* would be entitled to take the tithes from the other defendants, his tenants. He is setting up a counter title to the tithes, without any conveyance or pernanacy in any of his ancestors to support such a claim.

The whole defence therefore resolves itself in truth into a claim of *modus in non decimando*, founded on the long non-claim of tithes; but it is clear that such a defence is bad. *Benson v. Olive*, *Bunb.* 284. *Charlton v. Charlton*, *Bunb.* 325. The corporation of * *Bury v. Evans*, *Com. R.* 643. † *Nagle v. Edwards*. In the two latter cases, the presumption of a conveyance from the lay impropriators was insisted on; but the court held it to be only ano-

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Supra 701.

Supra 715.

* *Supra*

757.

† *Supra*
1442.

1797. ther mode of claiming a *modus in non decimando*, and rejected it accordingly.

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Here, the plaintiff's family being *Roman* catholics, could not with safety stir any question with their neighbours concerning tithes, and the length of non-claim is therefore no proof against them.

Partridge and *Romilly*, for the defendants.—Since the tithes which were vested in the different monasteries came into the hands of laymen, they have been transferable like any other lay-property, and all rules of construction or presumption of such conveyances ought to apply to them; accordingly, grants or conveyances of tithes have been presumed from length of possession. *Scott* ^{Supra}1174. v. *Airey, Edwards* v. *Lord Vernon*. The reason why a prescription *in non decimando* could not originally exist, was, because the incumbent could not convey the tithes, and therefore a conveyance by him could not be presumed from length of time, or any other evidence; but when the reason ceased to exist, the rule ought to have varied accordingly. Every thing which could be lawfully [1487] done shall, after long possession, be presumed, **Beadle* v. *Beard*,
* ^{Supra} 892. 12 Co. 5. the mayor of *Kingston* v. *Horner*, *Comp.* 102. 12
^{Supra}1397. *Mod.* 181. *Sawbridge* v. *Benton*, otherwise the length of possession would be detrimental to the possessors, from the danger of the grants being lost or defaced. The cases which determine that such a presumption cannot exist against a lay impropriator, may therefore deserve to be reconsidered.

But the present is distinguishable from those cases: in each of them only some particular species of tithes was disputed. But the presumption of accidental omission to collect, or of fraudulent subtraction of one species of tithes, is much greater, and the probability of a conveyance of it much less, than when the whole tithes of a large district have been immemorially withholden.

There is a great probability that the lands of *Thoby* were not originally a part of the parish, and that the tithes of that district were vested in the monastery by some distinct title. That lands might be so annexed to a parish appears by *Seld. Hist. of Tithes*, c. 9. s. 4. and the express mention in the grant to the plaintiffs of the tithes of the other demesnes, seems to imply such a separate title. There is also some reason to suppose that it was originally a separate parish. For although the existence of the church of *St. Leonard* may be referable to the monastery, yet it may also be referred to an ancient parish or extraparochial chapelry, of which the memory is now lost. The fact of the plaintiff's ancestors never having demanded tithes from so large a district, can only be accounted for by supposing that it was known, for some reason now with difficulty

guessed at, that the tithes of these demesnes were not included in the grant.

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It is clear that the grant to the defendants of all the hereditaments of the monastery in *Thoby* would carry the tithes, if not before vested in the plaintiff.

Burton, in reply.—The cases of *Bury St. Edmunds v. Evans*, and *Nagle v. Edwards*, did not go on the particular circumstance of only some species of tithes being there disputed, but upon the general ground, equally applicable to the present case, that the length of non-payment of tithes to a layman cannot be set up to prove either a *modus in non decimando*, or a presumed conveyance equivalent to such a *modus*.

In all the cases where conveyances have been presumed, there has been actual possession to raise that presumption. Here, the defendant has had no possession of the tithes.

The case stood over till this day.

[1488

Macdonald, Chief Baron, in stating the case, remarked, that the express mention of the tithes of the demesnes, after the general grant of the rectory and tithes, seemed to imply some peculiarity in the title to those tithes which could not now be very clearly ascertained. The mention of the demesne lands in *Gynge Mounteney* seems to apply to a manor there distinct from the manor of *Thoby*, and over which alone the grant of tithes to the plaintiff extended.

It is not at all explained why the tithes of these demesne lands were never claimed, till the suit in 1739 as to another parcel of them. Lord *Petre's* family were not in fact during all that time under any disability to assert their rights; they were in very considerable power during the reigns of *H. 8. E. 6. Eliz. and J. 1.*, and his ancestor, who was first ennobled, was secretary of state under *Q. Eliz. and J. 1.*, and a protestant. The reason, therefore, of the tithes never having been demanded must be traced from other sources.

It is now established by many cases too firmly to be disputed, that mere non-payment is not, even among laymen, any answer to the demand of tithes. These determinations are perhaps to be lamented. I should have liked better to have found, in regard to tithes, the same principle of decision which regulates the title to every other lay-fee. If non-payment for any length of time forms no presumption of a grant of the tithes, then the length of enjoyment, which in all other cases is the best possible title, serves only to weaken the claim of exemption from tithes, as the difficulty of tracing its origin is increased. In the present case, it is hardly credible that the plaintiff's family have omitted, for above two centuries, to exert this right, from mere forbearance or negligence. Some other transaction probably took place between the parties,

1797. the memory of which is now lost. But the cases prevent us from deciding upon the ground of such a presumption.

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Although length of time be not of itself a title against the rector, yet if there appear any circumstances which can raise a doubt as to the original extent of his grant, the immemorial non-payment must give infinite force to such circumstances.

[1489] Here it is not probable that the lands of *Thoby* were originally a separate district or parish; and the grants to the plaintiff clearly mark some particularity in the title to the tithes of the demesnes. The searches which have been made as to the original boundaries of the parish, and as to the manors spoken of in the grants, have not gone so far as perhaps they might. It rather seems that the grant applies only to the demesnes of a manor in *Gynge Mounteney*, distinct from the manor of *Thoby*. Under such peculiar circumstances, so little explained, and where the possession so strongly fortifies every doubt of the plaintiff's claim, we are of opinion that the case ought to undergo the investigation of a jury, where the whole may be more closely investigated, and every circumstance of evidence receive its proper weight.

The court directed an issue, to try whether the plaintiff was entitled to the tithes of the lands in question.

Tr. 37 Geo. III. A. D. 1797. Scac.

Collyer v. Howes. [3 Anstr. 954.]

S. C.
4 Wood's
Decr. 440.
Clover-hay
is to be
tithed in
the cocks,
not in the
swathe.

IN this case the simple question was, in what manner clover-hay is to be tithed. The court had upon a former hearing determined that it is tithable in the swathe. But upon a re-hearing they changed their opinion, and the Chief Baron spoke, as it is reported, as follows:

Macdonald, Chief Baron. — When this cause was before the court on a former occasion, the evidence was not so fully discussed, nor the point so clearly illustrated as it has now been, and we are very happy in an opportunity to reconsider our determination on a subject of such general importance.

The broad question to be decided is, whether the tithe of clover can, according to the evidence before the court, fairly and legally be set out in the swathe, or whether it must be set out in some later stage, when the article gets into the shape of cocks.

The first and strongest testimony is the *evidentia rei*, the utter impossibility of ascertaining, with any precision, the fairness of the tithe if set out in the swathe. If the field is irregular, the length of the swathes must be unequal, and the parties must measure every swathe in the field, to determine the fairness of the tithe.

On the former hearing we decided for the defendant, on the ground that, according to the evidence then before us, clover does not in the usual course of husbandry get into the shape of a cock at all, but is generally carried immediately from the swathe. Upon the whole of the evidence now before us, we are satisfied that we were then mistaken in the fact: that clover, in almost every case, is put into cocks, sometimes only before carting, generally in a much earlier stage.

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It appears, indeed, that it is sometimes, though rarely, carried [1490] from the swathe; but this is so unusual that there is a contrariety of evidence, whether it is done in peculiarly fine or in remarkably bad seasons.

If it does not introduce a new and unprofitable mode of husbandry, this tithe must be subject to the general rule with regard to all hay. The general and irrefragable law of tithing is, that each article is to be tithed when it comes into such a state of severance that the parson may see whether he has his fair tenth. The stage of the process in which that object is best attained, marks the time of tithing.

This rule is analogous to that which prevails in other articles, similarly situated. The case of *Erskine v. Ruffle* applied it to barley. *Supra* 967. The tenant there tithed his barley in the swathe. This court directed him to account for the value of the tithes as being improperly set out. They held, that the barley must be collected into heaps, not by any similarity to the mode of tithing corn or hay, but from the nature of the thing; that the swathe is not such a state of severance as enables the clergyman to see that he has his tenth, and the article must therefore be put into a proper state for that purpose, before the tithes can be set out.

The court reversed the decree, and directed an account.

H. 38 Geo. III. A. D. 1798. Scac.

Parry and Gibbs v. Thomas Hervey, William Stephens, William Bennett, his Majesty's Attorney General, and the Bishop of Landaff, by original bill; and v. William Harvey, the son and executor of the above-named William Harvey, by bill of revivor; and v. James Lander and William James, assignees of the said William Harvey, a bankrupt, by supplemental bill. [MS.]

IN this case the bill stated, that the bishop of *Landaff* for the time being had been from the reign of *Ed. 1.* by virtue of a grant from that king up to the present time, and then was, seised, or entitled in right of his see, or otherwise, of or to the rectory or parsonage of *Newland* in the county of *Gloucester*, and the tithes both great and small arising within that parish, and particularly the tithes

Under a grant of tithes arising from lands *de novo assartatis et assartandis* in the extra-

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parochial parts of a forest, the grantee is not entitled to the tithes of lands in those parts in the occupation of the keepers of the forest, nor of lands inclosed by a private person by encroachment upon the forest; for this last is a *purpresture*, not an *assart*.

both great and small arising in or upon the lands in or before the reign of *Ed. 1.* or at any time since, assarted or to be assarted, and situated within the extraparochial parts of the forest of *Dean* in the said county of *Gloucester*: it then derived title to the plaintiff, *Gibbs*, who was a trustee for the other plaintiff, *Parry*, to the tithes arising upon the lands assarted or reputed to be assarted within the extraparochial places of the forest of *Dean* under a lease thereof from the bishop of *Landaff*; and after charging occupation and receipt by the three first named defendants of tithable matters within such extraparochial places, it prayed that they might be decreed to pay to the plaintiff, *Parry*, the value of the tithes subtracted by them from the year 1777.

The defendant *Harvey*, by his answer, stated, (among other things,) that his father, the said *Thomas Harvey*, deceased, was one of the keepers of his majesty's forest of *Dean*, and resided for several years before his decease at one of the lodges in that forest called *the Speech-house Lodge*, which he believed is situated in an extraparochial part of the forest, and that such lodge consists of a messuage, stable, and outhouses, to which and appertaining to the same are inclosed about forty acres of land taken out of the said forest, the sole property of his majesty, set apart and allotted for the use and support of the keeper of such lodge, and as servant to the king: that about ten acres of that land are converted into meadow or pasture, and the residue into arable: but that he could not set forth when, or about what time, such land was inclosed, nor the yearly value thereof; the same never having been let, nor otherwise holden or enjoyed by himself, his father, or any other person, than as such keeper as aforesaid: that he did not believe the plaintiff, *Parry*, was entitled to tithes of any thing which had arisen on such lands so in the possession of his father, as one of the keepers of the said forest, or any part thereof; such lands being in truth and in fact the sole property, and in the hands of the king, and occupied by his said father, as his majesty's servant, removable at pleasure; but on the contrary he submitted to the court, that such lands by virtue of the king's prerogative are wholly discharged and exempted from the payment of all tithes of what nature or kind soever, and from any composition or satisfaction in lieu thereof.

[1492] The defendant *Bennett*, by his answer, stated, (among other things,) that he was in the occupation of five small pieces of land inclosed in the extraparochial parts of the forest of *Dean* at several times since the year 1777, and amounting to five or six acres, or thereabouts, upon which he had raised barley, oats, &c.; but he denied that tithes were due of any of the things he had raised upon such lands; and insisted, that such lands, as being situated in, and part of the forest of *Dean*, such forest being part of the possessions

of, and belonging to the crown of *England*, were totally exempt from the payment of tithes or any composition in lieu thereof; and the rather, for that if the plaintiffs had such leases or grants from the said bishop of *Landaff*, and if the said king *Ed. 1.* did make such grant as in the bill set forth, yet that nothing did or could pass by law thereby, but only the tithes of such lands within the said forest of *Dean*, whether extraparochial or not, as were at the time of the said grant actually assarted therefrom; and as to any tithes of what nature soever which were to arise from any lands then parcel of the forest of *Dean*, which should be at any period of time after the passing of the said grant, and were not at the time of the making thereof, or in the lifetime of the said king *Ed. 1.*, actually assarted from the said forest, such grant (if any there were) could not be construed to extend any further than to the tithes of such lands as were then actually assarted, or should be assarted in the lifetime of the said king *Ed. 1.* who was the grantor thereof: that there was such exemption, and that such lands, or the tithes arising therefrom, were not deemed or taken to be within the said pretended grant or patent, or meant to be granted by the said bishop, or by the leases in the bill set forth, was evidenced by this, that no such bishop for the time being, or any person claiming under him from the time of such pretended grant to the time of filing the present bill had ever received any tithes, or any composition in lieu of any tithes arising on or from any lands assarted in the said forest; save and except as to such lands as were assarted in the reign of the said king *Ed. 1.* which had been commonly known and distinguished as *old assarted lands*, and which only for the reasons aforesaid could be considered as comprized in the said grant of the said king *Ed. 1.* and from which lands so known and distinguished as *old assarted lands*, and from no other lands in the said forest, had tithes of any sort, or a composition or other satisfaction in lieu thereof, been received by any bishop of *Landaff*, or any person claiming under him.

The defendant *Stephens*, by his answer, stated, (among other things,) that he was one of the keepers of his majesty's forest of *Dean*, and resident in one of the lodges in the forest called *Blakeney Lodge*, situated, as he believed, in an extraparochial part of the forest, and consisting of a messuage, stable, and outhouses, to which were inclosed about thirty acres of land taken out of the forest, the sole property of his majesty, set apart and allotted for the use and support of the keeper of such lodge, and as servant to the king; and that about one half of those thirty acres was converted into meadow or pasture, and the other part was left in its rough state: he then set up the same exemption from tithes for this lodge and the lands annexed to it, as was claimed by *Harvey* for *Speech-House Lodge*.

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The *Attorney General* in his answer said, that he claimed on behalf of his majesty such interest in the tithes in question as his majesty was entitled to, and submitted it to the care and protection of the court.

The bishop of *Landaff* admitted the execution of the leases stated in the bill, and submitted that the plaintiff was entitled to the tithes demanded by the bill.

The plaintiffs having replied to the answers of the three first defendants, and issue being joined, and witnesses examined, the cause came on to be heard this term, and after long argument at the bar, the judgement was delivered on the 2d day of *March* 1798, at the sittings at *Serjeant's Inn Hall*, by the

Lord Chief Baron. — This cause of *Parry v. Harvey* has stood for judgement some time; not so much from any difficulty upon the subject, when it comes to be looked into, as from the novelty of it.

The plaintiff *William Parry* is the lessee of the bishop of *Landaff*, and, as such, he claims certain tithes; he claims that an account may be taken of all the tithable matters and things reaped, mowed, cut, gathered, or in any manner had and subtracted by the defendants in and from certain farms, lands, and tenements during their respective occupation thereof from the month of *May* 1777 to the present time; and also of all the tithes and tenths thereof; and likewise of the full value of such tithes and tenths.

The defendants are three in number. Two of them stand in this predicament; they are keepers in the forest of *Dean*; the one of them, as keeper, occupying one lodge called *Speech-house Lodge*; the other, as keeper, also occupying a lodge called *Blakeney Lodge*, and together with those lodges occupying and having, as far back as the memory of witnesses goes, certain parcels of lands, partly grass, and partly corn.

The grant itself, under which the lessee claims, is a grant subsidiary to a former one, by which the rectory of *Newland* was given to the bishop of *Landaff* by king *Ed. 1.*, and the great tithes granted to him and his successors. In addition to that in 33 *Ed. 1.* the king

[1494] grants in these terms: *Rex omnibus ad quos, &c. Salutem. Sciatis, quòd ad emendacionem episcopatus Landavensis, qui nimis exilis esse dinoscitur, necnon in subvencionem sustentacionis cujusdam capellani divina pro animâ nostrâ et animabus antecessorum nostrorum singulis diebus celebrantis et imperpetuum celebraturi in ecclesiâ omnium sanctorum de la Newelande infra forestam nostram de Dene, quam venerabilis pater Johannes episcopus prædicti episcopatus tenet sibi et suis successoribus, appropriatam, concessimus eidem episcopo pro nobis et hæredibus nostris, quantum in nobis est, quòd ipse et successores sui, episcopi ejusdem loci, omnes decimas de assartis infra forestam præ-*

dictam de novo assartatis et assartandis provenientes percipiant et habeant ecclesie sue de la Newelande predictæ, quas ad eandem ecclesiam volumus imperpetuum pertinere sine obstruccionem vel impedimento nostri vel hæredum nostrorum seu ministrorum nostrorum quorumcunque; dum tamen assarta predicta extra limites cujuscunque parochie existant. In cujus, &c. T. R. apud Westm. xx. die Marcii. Per ipsum R. et Peticionem de Consilio.

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There appear to have been proceedings upon this in the reign of *Ed. 2.* in two or three instances: for we find that several of the adjacent rectors claim, as belonging to their rectories, certain parts of those tithes given by this grant; there were commissioners to inquire which were the assarted lands meant to be the subject matter of this grant, and likewise directions to the keepers to assist the bishop in the recovery of those tithes. From that period downwards, from the conclusion of those proceedings to the present time, we hear of no claim whatever, except that in the year 1784 in *Bunbury (a)*; the same sort of claim was then set up, and there was the same imperfection in that claim which there is in this (*b*), namely, that the lease from the bishop states, that it was late in the occupation of a certain person, when it was not in his occupation; however, it is better to determine the question upon the broad [1495] ground than upon that. The grant itself is a grant which is mentioned in more places than one in lord *Coke's* commentary upon the statute of tithes; and also in a very curious chapter in *Selden*, where he endeavours to prove (what is not now denied) that in former times it was usual for the king and the nobility to grant tithes, not to the rectory itself, or in assistance of the parish priest; but the tithes of lands lying in *Kent* would be granted to a rectory in *Cornwall*, and so on. The grant was, undoubtedly, a grant recognized at that time: but the question will be, what the true interpretation of that grant is, and what it really contains; for, if the lessee of the bishop, in this case, is seeking what never was granted to the bishop, of course his claim falls to the ground: if he is seeking what was granted to the bishop, no time that has elapsed can alter it, though for some centuries there was no claim upon this grant. Then the question is, what are the lands *assartatæ*

2 Inst. 647.

Seld. Hist.
c. 11. § 4.

(a) That was the case of *Bond v. Barrow*, Bunb. 312. the report of which is as follows. — "Upon a bill for tithes of assart lands, Baron Comyns seemed to be of opinion, that the words, *de novo assartatis et assartandis*, in the grant of *Ed. 1.* should be construed to extend only to such lands as were at that time assarted, or intended shortly to be so, and not to such as in future ages should happen to be assarted, especially if no tithes have usually been paid; as, if a man grants the wool of his sheep that he shall have seven years hence, if he had no sheep at the time of the grant, it

shall be void."—S. C. Serj. Hill's MSS. vol. 24. p. 40. *Quære* Hob. 132.—For the pleadings and decree in the case of *Bond v. Barrow*, vide 2 Wood's Decr. 317.

(b) The lease of 1784, in the present case, stated the tithes thereby demised to have been formerly holden and enjoyed by one *Edward Bond*, afterwards by lord *Coleraine*, since then by lord *Romney* and *William Masterman*, and then lately by *Edward Sandys Lechmere*, and *Thomas Mell*.

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et assartandæ? We must, in construing a king's grant, take it according to its true and legal interpretation; and there are recognized two ways in which the king may be damnified; the one is, by any person's *assarting* his lands; the other is, by any person's committing a *purpresture* upon his lands. These are two perfectly separate and distinct things. The *assarting* of lands, as I shall shew in a moment, was, (and all the regulations of the forest laws upon the subject are applied entirely to this case,) when private persons had lands within the regard of the forest: they could not themselves *assart* their own lands, that is, they could not pluck up the timber or underwood by the roots, and make it arable land, even upon their own lands, without a regular and solemn process: an application must be made to the crown for an *ad quod damnum*; that writ must be issued, and an inquisition taken upon it; if it was returned, that there is no damage, a licence from the Chief Justice in Eyre was granted to *assart* the lands. But *purpresture* is different from *assarting*, because that is felling the timber, but not plucking it up by the roots. And it is everlastingly to be kept in view, that the preservation of the game was the sole object of those laws, and the game were not so much hurt by leaving the stub, as in the case of an *assart*, where it would never grow again. For this reason the *assarting* of lands without the king's licence, or committing waste, and a *purpresture*, are very different things: the *assart* was treated with considerably more severity by the forest laws than a

[1496] *purpresture*. With respect to a *purpresture*, a man laying the lands of the king adjacent to his own into his own inclosure, was punished very particularly; but not so much, as in the case of *assart*; because it might be soon put an end to, and no irreparable mischief, as in the case of *assart*. Then let us see what is the fact in the present case upon the evidence. The fact upon the evidence is, that there is no symptom of *assart* whatever. All the witnesses say, that these lands, excepting three acres lately laid in, have been occupied by these keepers, who are recognized by the forest laws as regular and ordinary servants of the king in his forest. There is no pretence to call this an *assarting*. Then these are the demesne lands of the king occupied by himself through his servants. These are extraparochial places; the tithes therefore would belong to the king: but, can it be said, that these lands of the king, occupied by his servants, supposing them even to be within the definition of an *assart*, that the king *assarting* these lands, holding them himself, and occupying them by his servants, can tithes of these ever be said to be the subject matter of this grant? It would be an exceedingly wide construction of it indeed to say, that the lands which the king shall *assart* himself shall be tithable to the bishop of *Landaff* by virtue of this grant; if this grant should be meant in this sense,

no tithe would be due (if these lands were assarted) at all: therefore the grant must be interpreted to create tithes of these lands instead of its being interpreted to say, that when tithes should arise those tithes should go to the bishop. In this case the two defendants, who are keepers, are out of the question. But there is another defendant, of the name of *Bennett*, who within seventeen or eighteen years appears to have inclosed a parcel of land of the king's adjacent to his own. Then upon the very fact *assarting* is negatived here, because this is a description of encroachment; nay, from time to time they have been thrown down, and still this man has erected them again; and in many instances the same has been done. Then that being the fact, let us see what good writers upon the subject have said upon the distinction between these two cases of an *assart* and a *purpresture*, and what constitutes a *purpresture*, and what does not.

The definition of an *assart* will be found in *Dufresne's Glossary*, tit. *Exartus*. It is curious, that this foreign writer borrows his definitions from our ancient books, and from the *Red Book of the Exchequer*. In the *Red Book* assart of the forest is described, "*Quando forestæ nemora vel dumeta quælibet pascuis et* [1497]"
latibulis ferarum opportuna succiduntur; quibus succisis et radicitus
evulsis terra subvertitur et excolitur." And you find that the Register upon the writ of *ad quod damnum* says, "*Inquiratur si sit ad*
damnum seu nocumentum forestæ nostræ prædictæ aut alicujus alterius, se concedamus. A quod ipse arbores in bosco suo de M. qui est
infra metas forestæ nostræ prædictæ, succidere, et eas, quo voluerit,
cariare, ac commodum suum inde facere, et solum illud postmodum
assartare, et in culturam redigere, ac parvo fossato et bassa haya
secundum assisam forestæ includere." *Manwood* says upon that,
 "So that if a man hath any woods or underwoods, or any other
 coverts in the forest, as heath, broom, fern, and cut it down or
 pull it up by the roots, that the land is made plain, or converted
 into arable or pasture, then it is called *assart of the forest*, or *land*
assarted, though the owner receive no profit by it." *Mr. Heskett*
 was of opinion, that if a man hath meadow or pasture ground in the forest, which is surrounded with thick coverts, where the wild beasts of the forest frequent, if the owner, or tenant, or other occupier thereof convert the same into tillage, it is an *assart of the forest*, or *land assarted*. He says, the difference between waste of forest and an *assart* is this: a *waste* is the felling or cutting down any covert of the forest without licence; but an *assart* is the destroying any covert, and converting it into plain or arable land. You likewise find in *Rastall*, title "*Forests*," 34 E.1. it is ordained, "*Quod si quis*
inventus fuerit in dominico domini regis assartando, vel purpresturam
faciendo corpus debet protinus retineri: si autem extra dominicum

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1798. “ *infra rewardum, debet poni per sex plegios: si autem alias inveniatur;*
 “ *debet duplicare ejus plegios: si tertio, corpus debet retineri.*” And
 Parry v. Harvey. such an offender, for the third offence, is not, by the laws of the forest,ailable by any man, but only by the Lord Chief Justice in Eyre, or his Deputy. It is certain by this, that there is a difference between assarting the king’s lands, and assarting any other man’s lands.

Dufresne’s
 Glo. tit.
 Porpre-
 dere.

[1498]

Lib. ix.
 § 11.

Now with respect to a *Purpresture*, let us see what that is: The *Red Book of the Exchequer* tells us what a *Purpresture* is, I mean, as applied to the forest laws. “ *Purprestura fit interdum per negligentiam vicecomitum vel ejus ministrorum; vel etiam per continuatam in longa tempora bellicam tempestatem, ut habitantes prope fundos, qui coronæ annominantur, aliquam eorum sibi portionem usurpent, et suis possessionibus ascribant. Cum autem perlustrantes judices per sacramentum legitimorum virorum hæc deprehenderint, seorsim a firma comitatus appretiantur, et vicecomiti traduntur, ut de eisdem seorsim respondeant. Et hæc decimus Purpresturas vel occupata.*” In *Glanville* the description of it is this: “ *Dicitur autem purprestura vel porprestura, propriè quando aliquid super dominum regem injustè occupatur, ut in dominicis regis, vel in viis publicis obstructis, vel in aquis publicis transversis a recto cursu; vel quando aliquis in civitate super regiam plateam aliquid ædificando occupaverit. Et generalitèr, quoties aliquid fit ad nocumentum regii tenementi, vel regie viæ, vel civitatis, placitum inde ad coronam domini regis pertinet.*”

In the assizes at *Lancaster*, 12 *Ed. 3.*, it was adjudged in the general eyre of that forest, that no man may inclose any ground in the forest *ad nocumentum ferarum*, and that such an inclosure is a *purpresture*. And though he hath a licence to inclose, it must not be done *cum alta haya et fossato, nec cum alto palatio*; for if he doth, it is *contra assisam forestæ*. And then we find from the same authority, Mr. *Manwood*, that his opinion is, that the true difference between *assarts* and *purprestures* is, that an *assart* is the converting any coverts in the forest into arable; but *purpresture* is a wrongful encroaching of a new thing either upon the king or a common person.

Now, we have in the *Charta de foresta* 9 *Hen. 3.* this clause, “ All archbishops, bishops, abbots, priors, earls, barons, knights, and other our freeholders, which have their woods in forests, shall have their woods as they had them at the time of the first coronation of *K. Henry* our grandfather, so that they shall be quit for ever of all *purprestures*, wastes, and *assarts*, made in those woods after that time until the beginning of the second year of our coronation.” Therefore, there is a whole body of authority here manifestly shewing that an *assart* and a *purpresture* are very different things: so that we have only to apply the evidence in this

case, and see whether it be that thing which is the real subject matter of the grant. I stated before what the evidence shews this to be: I think certainly not an *assart*. But there is another question which it is necessary to agitate. We find upon a former occasion, when this was before the court of Exchequer in 1732 or 1733, that the court entertained a doubt about *de novo assartatis et assartandis*. In those days, however inelegant, they were certainly grammarians, and perhaps the word *assartaturis* would have been the proper word: and the court doubted whether the word *assartandis* was to be taken in the extremely wide sense in which it is necessary to interpret it for the interpretation of this grant. Perhaps it might be, that the court doubted whether the king could grant that which he had not. But it is not necessary to decide upon that in the present case. I cannot help thinking that the interpretation which must be put upon this, when the definitions are compared with the fact that has happened, must be the reason why we have never heard any thing of this for ages: because, if there had been no regular *assarts*, there could have been no opportunity for claim, and we all know too well the history of forests not to know that that must be the case. But those who advised the bishop at that time say, this does not fall within the interpretation of your grant; for the king could never have made a grant, the consequences of which would be a heavy offence against himself: for it presupposes that the king should say, if any man shall steal any part of my lands, then shall the bishop have tithe of those lands; but that the king should give the bishop the fruits of any assarts that existed at that time, or (if that be the interpretation of the grant), of any which shall exist under these circumstances, is more intelligible, than the absurdity of fancying offences committed against himself, and that the bishop should have those tithes. Therefore I think it is very clear from what we find in ancient respectable writers, that those lands, as described in evidence, do not fall within the terms of the bishop's grant; for which reason the bill must be dismissed.

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v.
Harvey.

[1499]

H. 38 Geo. III. A. D. 1798. Scac.

Markham v. Hurley. [MS.]

THE rector of *Tattenhall* in the county of *Chester* claimed the great and small tithes arising in the parish, except such as were specified in his bill; and in particular he claimed the tithes of the hay, pigeons, ducks, chickens, poultry, orchard fruit, garden fruit, garden stuff, honey, agistment of dry, barren, and unprofitable cattle, which had arisen on the lands of the defendant: and *Easter* offerings for persons above the age of fifteen years, who had received or ought to have received the holy communion in the said parish church.

S.C.
4 Wood's
Decr. 542.
A *modus*
of 1s. for
each day's
math, and
so in pro-
portion, &c.
is good.
A variation
by the wit-

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v.

Huxley.

nesses in
the descrip-
tion of the
land will
not vitiate
a *modus*,
provided
they agree
in pointing
out parti-
cularly the
land co-
vered by it.

*[1500]

The bill charged, that the lands in the parish had not been cultivated so as to produce hay until of late years, and within the time of legal memory, and that in fact no hay had been gathered therein until some time within memory. The bill also charged, that the terms *Cow Meadowing*, or *Water Meadowing*, and *Butland* or *Upland* **Grounds*, had not been constantly and from time immemorial applied to the same particular grounds, and that there had been no lands or grounds in the parish which had been constantly and from time immemorial called, known, or particularly distinguished by the respective names of *Cow Meadowing*, or *Water Meadowing*, or *Butland*, or *Upland Grounds*, but that such description had sometimes varied and been applied to the same lands according to circumstances, with respect to the actual situation of such lands, and with reference to their being flooded or not flooded in the season of that year. The bill further charged, that a day's math did not mean or comprehend any specific or definite quantity of land or ground in the parish, but varied, or was subject to variation or change in different parts thereof, according to the nature or quality of the land or the quantity of the produce thereof, or from other circumstances. The bill therefore prayed an account of the tithes (except of corn and grain), which had arisen respectively from the farms in the defendant's occupation from the year 1782, and also of *Easter* offerings; and payment of what should appear due thereon.

The defendant insisted that the plaintiff was not entitled to the tithe in kind of hay, for that from time whereof the memory of man runneth not to the contrary, there had been payable and paid, and of right still ought to be paid to the rector thereof for the time being, by the inhabitants of the said parish occupying certain meadowing commonly called and described in the said parish, as *Cow* or *Water Meadowing*, 1s. for each day's math thereof, and so in proportion for any less or greater quantity than a day's math, as a *modus* or customary payment in lieu of the tithe in kind of hay yearly arising and gotten upon and from such *Cow*, or *Water Meadowing*; and also, that there had been payable and paid, and of right still ought to be paid to the rector of the said parish for the time being, by the inhabitants of the parish occupying *Butland* or *Upland Grounds* in the same parish 6d. for each day's math, as a *modus* or customary payment in lieu of the tithe in kind of hay yearly arising and gotten upon and from such *Butland* or *Upland Grounds*; that the said *moduses* had been constantly paid at the feast of *Easter* in every year, and accepted as such by the rector for the time being of the parish until the plaintiff refused to accept the same; that the day's math consisted, according to the usage and custom of the parish, of eighty roods, each rood containing sixty-four square yards. He also insisted, that within the said parish

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*[1501]

there had been immemorially payable and paid to and accepted by the successive rectors thereof, and still of right ought to be paid to the rector for the time being, certain other *moduses* or customary payments at the feast of *Easter* annually, in lieu of the tithes in kind following, *viz.* the sum of one penny, commonly called *Hen Penny*, in lieu of the tithes in kind of all eggs, hens, and ducks belonging to any inhabitant of the parish; also another sum of one penny, commonly called *Garden Penny*, in lieu of the tithes in kind of all fruit, garden stuff, and other tithable matters arising from ancient gardens and orchards by each and every occupier thereof; also another sum of one penny, commonly called *Bee Penny*, in lieu of the tithe in kind of all honey had and gathered in the said parish by each and every owner of bees inhabiting therein; that the same had, in each and every year since the plaintiff's induction, been by the defendant duly paid to and accepted by him or his agent for his use, in lieu of the tithes in kind of the several tithable matters aforesaid up to the feast of *Easter* 1792 inclusive, and that he had also accounted for all his other tithable matters and things up to the said time, and for his *Easter* offerings two-pence a-head, according to immemorial usage; and he set forth the lands he held under *John Crewe*, esquire, as his tenant, and the quantity and quality of the tithable matters he had thereon; but he admitted, that the plaintiff was entitled to agistment tithes. He further said, that after the feast of *Easter* 1792, and before and after the plaintiff exhibited his bill, he tendered to him all the said *moduses* or customary payments, which tenders were set forth in a schedule to his answer, but that the plaintiff had refused to accept thereof.

The other defendants, as tenants to *John Crewe*, put in the like answers, and insisted on the said *moduses*.

The plaintiff replied; the defendants rejoined; and witnesses were examined on both sides; and their depositions being duly published, the cause was heard; and the following evidence received, *viz.* the answers of the defendants; the depositions of the witnesses; and a terrier belonging to the parish of *Tattenhall*, dated the 28th of *July* 1770; and the matter was fully debated.

Lord Chief Baron.—It hath been insisted in this case on the part of the plaintiff, that the *moduses* for the hay are deficient on the ground of rankness and uncertainty. But one cannot help observing, looking only at the case which the plaintiff himself has made, that his own evidence proves, that these payments have been regular and unvaried; and that the land in respect of which they have been made is known to every one of his witnesses even by the eye. It is said, that the first *modus* particularly is rank. I see [1502] no reason to pronounce it so, and there are many cases which have decided otherwise. In considering such a sort of *modus*, it

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v.
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is not a fair rule to look at the mere value, and from comparative reasoning to determine the validity of the custom. There is no probability of any permanent agreement of such sort having been made without some regard to probable improvements. It is unfair to make the value the exact criterion to judge by, because agreements of this kind are not similar to other human transactions in matters of contract; and it is very probable that other motives, beside those of interest, may have operated on the mind of one of the contracting parties, and have determined him to make a very beneficial bargain for the parson.

As to the uncertainty, it is said to consist in the description which the witnesses have given of meadow land and upland. If the witnesses had said "we cannot tell you which is meadow land and which is upland; but all within such a description is meadow land, and all within such a description is upland;" there they must have agreed in their description, or they would fail. Here, however, they all agree in knowing the land; they only add unnecessary descriptions of it, in which they vary. But that variation is immaterial, when it is in evidence, that the land itself is known to them, and capable of being pointed out. Then as to the *day's math*, the evidence is extremely strong in support of the defendant's allegation, that it consists of eighty roods, that is, about half of a *Cheshire* acre. It is impossible therefore to say, that the court can decree for the plaintiff without issues.

Hotham, B.—If we were bound to pronounce an absolute decree at once, I should say without hesitation, that the plaintiff has made no case at all. I throw this out, because it may be of use for the rector to know it. There is no pretence for the objection of rankness; neither is there any uncertainty: the two descriptions of meadow and upland are well known. It is a case of no doubt. But to be sure there must be issues, if the rector desires them.

Perryn and Thompson B. of the same opinion.

The rector waving the issues, the bill was dismissed with costs.

[1503]

P. 38 Geo. III. A. D. 1798. Scac.

Tate v. Skelton. [MS.]

S.C.

4 Wood's
Decr. 550.
Monasteries which
were dissolved and
come to the crown after
the 4th of Feb.
27 H. 8.

THIS was a bill by the rector of *Coningsby* in the county of *Lincoln* for the great and small tithes of the parish. The defence set up by the answer was, that the lands, whereof the tithes were demanded, were formerly part of the possessions of the abbey of *Kirksted*, which abbey was of the order of *Cisterians*: that it was dissolved by *H. 8.* and its possessions vested in the crown: that at the time of the dissolution the lands in question were in the manurance and occupation of the abbot and convent; and were holden

by them at such time discharged and exempt from the payment of tithes: that the lands were now vested in the defendants who were severally seised of estates of inheritance therein, and that they were exempt and discharged from the payment of tithes whilst in the manurance and occupation of the owners thereof; and that no tithes, or any composition or satisfaction in lieu thereof, had ever been paid for them, when they had been in such manurance and occupation.

It was proved in this case that the lands belonged to the abbey of *Kirksted*, and that that abbey was a *Cistertian* abbey: that the lands were granted to the abbey by king *John* in 1210, which was five years before the last council of *Lateran*: and there was a great deal of parol evidence shewing that no tithes had ever been paid in respect of the lands, when they were in the manurance of the owners. But it was also in proof, that the monastery with its possession had come to the hands of the king in 28 *H. 8.* by the attainder of *Richard Harrison (a)*, the abbot, and that these lands were granted in 30 *H. 8.* by the crown to the duke of *Suffolk* in fee. It was contended therefore by *Partridge* and *Richards* on the part of the plaintiff, that as the lands were not in the possession of the crown when the statute of 31 *H. 8.* was passed; as the crown [1504] had parted with them before that time; they were not within the protection of the 21st section of that statute: that when in the hands of the duke of *Suffolk* they were liable to the payment of tithes; that being in his hands, and so liable at the time of passing the act, the act could not attach upon them: that this act was to be construed like the statute of *wills*, where the word "having" confines the power of devise to those lands only which the testator has at the time of making the will.

But the court were of opinion, that the statute of 31 *H. 8.* was sufficiently broad to comprehend all monasteries which were dissolved after the 4th of *February 27 H. 8.* and that the lands of any such monasteries were exempt from the payment of tithes under that statute, though the crown may have granted them away before the statute was passed. And they cited in support of their opinion the case of *Walklate* and *Wilshaw (b)*, *Degge's Par. Couns.* 326, 7.

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and before the 31 *H. 8.* are within the protection of 31 *H. 8.* c. 13. s. 21. though not in the possession of the crown at the time when that act was passed.

(a) This unfortunate abbot was attainted of high treason. The treasonable act was, his refusal to surrender to the king the possessions of his convent. Whether such a refusal were a treasonable offence; or, whether a corporation aggregate would incur a forfeiture of their possessions by the attainder of their president, are questions which, perhaps, a modern lawyer would hesitate to answer in the affirmative.

(b) This case was determined in the Exchequer Chamber, and was between *Walklate*, farmer to the Dean of *Windsor*, of the rectory of *Uttore-*

ter in the county of *Stafford*, and *Wilshaw*, owner of a farm in that parish. This farm was parcel of the possessions of the abbey of *Crorden* in that parish, which was one of the small abbies, and of the *Cistertian* order. It was discovered to have been continued by letters patent under the great seal of *England*, and so not dissolved till the 31 *H. 8.* whereupon the defendant was dismissed, and the court clearly held the lands discharged of the payment of tithes by the statute of 31 *H. 8.* *Degge*, p. 2. c. 21.

1798.

P. 38 Geo. III. A.D. 1798. Scae.

Mantell

v.

Paine.

S. C.

4 Wood's

Decr. 561.

The marginal abstract is attached to the judgment.

Mantell v. Paine. [MS.]

[1505]

THE plaintiff, as lessee of the three chapels or parsonages of *Frensham* and *Elsted* in the county of *Southampton*, and of *Bentley* in the county of *Serrey*, filed his bill against the defendants, *Paine*, *Yalden*, and *Mills*, stating (among other things,) that the defendant *Paine* held a farm in the chapelry of *Frensham*, and had agisted thereon barren and unprofitable cattle, to the tithes of which, except of the eatage upon turnips to *Michaelmas* 1793, he was entitled; that the said defendant had upon his said farm a number of young pigs; that he had also in the said years cut down, sold, converted, and disposed of for his own use, coppice-wood, underwood, and other wood not being timber or timber-trees in and upon his said farm; that during the year 1792 he had reaped and carried away for his own use wheat and other corn and grain therefrom; that in the years 1792 and 1793, and since that time, he had kept thereon milch cows which produced milk; and that in 1793 he had drawn up, severed, gathered, carried away, disposed of, and converted to and for his use a number of young firs, fir-plants, and other plants and shrubs out of the said farm, the tithes of which he had refused to pay. The bill further stated, that the defendant *Yalden* occupied a farm in the chapelry of *Bentley*; that he had cut down, sold, and disposed of for his own use, coppice-wood, underwood, wood for and made into charcoal, and other wood not being timber or timber-trees; that he had also kept barren and unprofitable cattle of different kinds thereon; that he had also mowed clover and artificial grass thereon, and used the same for green fodder and various other purposes; and that he had, in the year 1793, severed, carried away, and converted to his own use great quantities of peas, the tithes of all or any of which he had refused to pay. The bill then further stated, that the defendant *Mills* occupied a farm in that part of the chapelry of *Frensham* called the tithing of *Dockingfield*, and had had thereupon peas, hay, hay-grass, and various other tithable matters, the tithes of which he had refused to pay. The bill therefore prayed an account and payment.

The defendants admitted, that the plaintiff was lessee of the tithes as stated in the bill; and the defendant *Richard Paine* said, that he occupied certain lands in the chapelry of *Frensham*; that he had paid to the plaintiff a composition for his tithes to the 10th of *October* 1791; that the plaintiff had given him notice to pay his tithes in kind from that time; that he had, after the 10th of *October* 1791 and before the 10th of *October* 1793, agisted sheep on turnips; that he after the 10th of *October* 1793 rendered the plaintiff an account in writing of the agistment of each sheep, deducting for such

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as had been shorn and paid tithe-wool; and also an account of the tithes of his calves during the said time, and of some flax; that on the 3d of *December* 1793 he paid him the amount of such account, and took a receipt for it; that he had not after the said 10th of *October* 1791, and before the filing of the bill, agisted any horses or oxen, except what were used for husbandry, or any heifers or any barren cows or other unprofitable cattle whatever, except that in the summer of 1793 he had bought in two heifers, which were breeding up for the pail, and a yearling colt, which he intended for husbandry, and for the feed of which no tithe was due; that he had not, since the 10th of *October* 1793, agisted any sheep but the [1506] sheep which he still had, and which were intended to be shorn within the said chapelries, except, 100 sheep, which were sold at *Lady-day* last, and which were fed on turnips, the tithe whereof had been fairly set out; that he had farrowed two pigs in 1792, and five pigs in 1793, and that he had taken such pigs to his own use without making the plaintiff any satisfaction for the tithe thereof, for that there was an immemorial custom in the said chapelries or parsonages, as well as in several neighbouring parishes or districts, that every occupier of lands or tenements within the same having any pigs farrowed within the same to the number of seven or upwards, and not exceeding ten in number, should render and pay to the owner or proprietor of tithes of the said chapelries or parsonages, or his lessee or farmer, or lessees or farmers, one of such pigs for or in lieu of the tithes of such number of pigs for that year, and that each and every such occupier should not render or pay any satisfaction in respect of the tithes of pigs being under seven in number in any one year. He further said, that he had not, since the 10th of *October* 1791, cut any coppice-wood or underwood on his farm, except that in 1792 he had cut down a small coppice in *Pond Field*, and that he had duly set out the tithe thereof; which the plaintiff had carried away, and except that in 1793 he had also cut down *Foul Hanger Coppice*, but that he had not set out any tithe thereof, because he had converted and applied the principal part thereof to the purpose of making hop-poles and hurdle-rods for the use of his farm, and the remainder for fuel in his house; and that by a custom in the said three chapelries or parsonages, except as to the tithing of *Cheert* respectively, which had subsisted from the time whereof the memory of man was not to the contrary, and still subsisted, no tithes of any coppice-wood or any other underwood, cut within the said three chapelries, except as to the said tithing, and applied to the purposes of husbandry therein, or for fuel for the house, or any satisfaction in lieu thereof, ought to be rendered or paid to the owner or proprietor of the said three

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several chapelries or parsonages respectively, or his lessee or farmer, or lessees or farmers. He further said, that by the custom of the *Weald* of *Surry*, no tithe was due of underwood cut within the tithing of *Cheert*, which was situated within the parish or parsonage of *Frensham*, and is part of the *Weald*, but that no part of his lands was within the said tithing of *Cheert*; and he further said, that he had set out his tithes of wheat by the sheaf: and he set
 [1507] forth the tithes of milk and calves, fir plants, and other things, and submitted to the court whether any tithe became due to the plaintiff in respect of fir plants removed from one farm to another farm in a different parish; and denied that he had caused any part of the tithes to be subtracted from the plaintiff, or any part thereof to be set out or left fraudulently or vexatiously for him, contrary to the usage or custom of the country.

The defendant *John Yalden* admitted, that he occupied the greater part of a farm situated in the chapelry of *Bentley*, called *Bury Court Farm*; that the residue was in the possession of the owner thereof; that he also occupied *Perry Land Farm*, in the said chapelry; and he set forth an account of his tithable matters, and spoke to the same effect as the defendant *Paine* had done; but further said, that in the years 1792 and 1798 he cut upon his said farms clover grass, and other artificial grasses, but that they were cut for the necessary use and support of his horses used in husbandry on his said farms within the said chapelries; and were (except what was eaten by his saddle horse) eaten and consumed by his horses used in husbandry. He further said, that he had in the said years also cut and severed thereon peas, and carried away the same, but that he had duly set out the tithe thereof, and left the same for the plaintiff. He denied, that there was any custom or usage as to any particular marks or tokens to be used in setting out the tithes of peas in the said parsonages; and insisted, that they were set out in wads; that each tithe-wad was marked with a number of straws which were stuck therein, in the same way as the farmers in the said parsonage had before set out the tithes of their peas, and that the plaintiff had taken them away without objecting to such marks as not being proper or sufficient.

The defendant *James Mills* admitted, that he occupied lands in the tithing of *Docking field*; and insisted, that the said tithing was extraparochial; and he set forth his tithable matters; and said, that in 1793 he had cut upon part of his lands some peas, and carried away the same without setting out the tithe thereof; for that the peas were sown by drilling, and not by broadcast, and that it had been the custom of the neighbouring parishes to con-

sider peas when sown in a broadcast as a great tithe, and when in drill as a small tithe, and that therefore the plaintiff was not entitled to the tithe thereof.

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Burton and Hall, for the plaintiff, objected to the *modus* for the pigs, as being bad in the manner in which it was laid; and as not being proved, as it was laid. It was bad in the manner in which it [1508]

was laid, inasmuch as it was an uncertain recompence for a certain duty; for if the number of pigs was under seven, it gave nothing; if above the number of seven, and not exceeding ten, it gave one: whether therefore the parson was to have any thing at all was quite contingent and uncertain. But both by the common law and the canon law the parson is in such a case entitled to a rate-tithe: the canon law gives a money payment for any number under six; and for all above that number, and under ten it gives him one, he returning to the parishioner a proportionate sum for the number it may fall short of ten: the common law gives a money payment for any number under ten. *Egerton v. Still*, *Supra* 661.

Bunb. 198. By both laws there is a *certain* something payable in all events. Here, the defendants insist upon a mere *non decimando* for all under seven; for there is no consideration for the custom. The custom as stated is bad too, because it does not apply to the short number exceeding ten; it goes only to ten, and not to the fractional parts between the decimals; whereas, it ought to have been stated, that after ten, they go on with the proportions; the words "so in proportion for a less number," ought to have been added. The allegation therefore is in that respect defective. In 1 *Ro. Abr.* 648. it is not a good *modus* to pay every tenth pound of wool for the tithe of wool, if he doth not shew that he hath paid something if his wool do not amount to ten pounds; for otherwise, this is *in non decimando* if it be under ten pounds; for the tenth part thereof is due. So *Gibb v. Goodman*, *Bunb.* 328. upon a custom *Supra* 735. so laid of tithing calves. But this custom is further bad, as being introductive of fraud: the eighth and ninth would always be still-born, when the parson came to inquire for them.

But the evidence does not correspond with the allegation. The custom is laid as to the whole number of pigs in the *year*; but the evidence is upon the *single farrow only*: for it is proved by two witnesses to be upon every farrow; that if less than seven at a farrow, nothing is to be paid, though never so many farrows in the year; so that the parson would lose all, though never so many sows produced never so many pigs at a farrow under seven each.

As to the coppice and underwood, we admit the exemption when used for fuel and husbandry purposes in the parish: but the exemption claimed for hedgerows when less than a rod or

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Supra 829.

* Supra

654.

† Supra

625.

‡ Supra

524.

§ Supra

835.

16½ feet in width we cannot admit: it is clearly bad: it is a pure *modus in non decimando*: no consideration for it is even suggested: the tithe of *silva cædua* is due of common right: a custom therefore to pay nothing for it is void, as well if the wood grows in hedgerows, as if it grows in other places. *Norton v. Fermor*, Cro. Car. 113. *Philips v. Symes**, *Bunb.* 61. *Jordan v. Colley*†, *id.* 171. To be sure, such a custom has been allowed where claimed by a large district; but not where claimed by a parish. This is not the first time tithe of wood in hedgerows has been claimed. There are many instances in Mr. Wood's book, in all of which it has been allowed: such are *Turner v. Waedon*‡, 1 *Wood's Decr.* 150. *Layfield v. Cowper*§, *id.* 330. *Goddard v. Mann*, *id.* 367. This custom too would be extremely liable to fraud; for it appears, that some of the wood in this case was sold, and some used for drying malt: then the occupier might sell all the narrow edges, all those under a rod in width, and use the wood growing in the wider ones for husbandry purposes; and he would in that case tithe none at all.

With respect to the wheat, they said, that it was tithable either by the shock or the sheaf. In *Pern v. Fountain*, 1 *Wood's Decr.* 504. it was decreed, that where the corn is placed in shocks, the tithe thereof ought to be set out by the shock, and not by the sheaf: that in the present case it was not set out either in the shock alone, nor in the sheaf alone. The evidence is, that the defendant put the wheat up in shocks of five each; that he made the tithe-gatherer go down from north to south setting out the tenth sheaf; then down again from south to north in the same manner, so that by this means there was always an opportunity for packing the sheaves. The first principle of tithing is, that the parson is entitled to have the tithes so set out in his own view, that he may be able to judge and compare them. It is said, that the common law method is to tithe by the sheaf; but the books certainly state that it may be tithed by the sheaf or shock. The occupier may, if he pleases, tithe by the sheaf; but he must always so do it, that the parson may compare the tithe-sheaf with the other nine; he must leave the whole in sheaves.

As to the grass cut green, the defence is that about ten or eleven acres were cut for the necessary support of the husbandry cattle. This at first blush may appear to be a good defence. But, upon examination, it will be found, that neither the allegation, nor the proof, is sufficient to support this defence. The defendant has not alleged (and not having alleged, he, of course, did [1510] not think himself bound to prove, and not thinking himself bound to prove, he has not in fact proved) that there was not a sufficiency of other food for the support of his cattle. But this is a

necessary part of the allegation ; and that it is so is clear from the case of *Crawley and Wells*, 1 Ro. Abr. 646.

As to the peas, the tithe is set out, not in the cock, as we contend it ought to be, but merely from the hook ; in little parcels, almost in handfulls, and so intermixed, that it was impossible for the parson to husband it or to carry it.

Partridge and Hollist, for the defendants, contended, that the custom as to the pigs was good : that the case in *Bunb.* 198. was in principle the same with this : that as to the objection that the fractional parts between the decimals were not provided for by this *modus* ; that might according to the case of *Gibb and Goodman* be supplied by the verdict : that as to the objection, that the *modus* was laid upon the years, but proved upon the farrow ; the answer might be amended in that respect ; or, the issue might be directed in the words of the answer with liberty to indorse the real *modus* on the *postea*.

As to the exemption of hedgerows where they did not exceed a rod in width, they insisted, the custom was proved in fact, and good in law : that wood was not *de jure* tithable : that if it were, the *Wealds* of *Kent*, *Sussex*, and *Surry* could not be privileged ; for a larger district could no more be protected by custom from the payment of a tithe due of common right, than a smaller district : that tithe of underwood was not due from *Cheert*, which was situated in the *Wealds* of *Surry*.

As to the wheat, wheat is tithable in sheaves. In the case of *Ledgar v. Langley*, 1 Sid. 283. " the parson libelled in the spiritual court for the tithes of corn in *stooks* and *hattocks* by custom ; the defendant pleaded to the libel, that he was ready to pay his tithes according to the common law, and that there was no such custom : this plea being disallowed, the defendant there prayed a prohibition, which, after two motions, was granted ; because tithe of corn shall be paid in the sheaf ; and if it be by the tenth stick or stook, it is by custom, and may be laid in discharge of other tithes, as of rakings, &c." In Ro. Abr. 644. pl. 5. it is said, that the parishioner of common right ought to make the corn into sheaves ; though in pl. 6. *Rolle* admits it to be a good manner of tithing to throw the shocks out ; that the tithe of the corn being set out, however improperly, the parson's remedy was at law, not in equity : that being set out, it could not be said to be subtracted ; and not being subtracted, there was no ground at all for an account. As to the clover and other grasses cut green, it is not charged that they were cut unnecessarily or improperly : it is sworn that they were cut for the necessary use of the farm ; and there is no proof to the contrary.

1798.

Mantell
v.
Paine.

[1511]

1798.

Mantell
v.
Paine.

A custom to pay one pig, where the number farrowed is seven and does not exceed ten, and to pay nothing where the number is under seven, is good. Wood growing in hedge-rows not exempt by the custom of a parish from tithes. Wheat regularly tithable by the sheaf. Whether clover cut green be discharged from tithe, depends upon the sufficiency of other food. Peas, how to be tithed.

*[1512]

Lord Chief Baron.—Although it appears on investigating this case, that the value of the tithes is small, yet, the principle of tithing, which we are called upon to consider, is material. At the same time one cannot help observing that this plaintiff is merely a lessee: that it is by such persons that the prejudice against tithes is chiefly inflamed. The relationship which subsists between pastor and parishioner begets mutual moderation. But a lessee's sole object is profit: he obtains the lease upon easy terms from the parson; and he exacts to the utmost from the parishioner. This gentleman at the outset insists upon tithes in kind; and he gives notice, as soon he gets into possession, to determine a composition which had subsisted a great number of years. The objection which has been made to the *modus* for pigs would be strong, if the subject were divisible; but as the case stands there is nothing in reason against it; for, as laid in the answer, it would be exceedingly beneficial to the parson, this animal being very prolific; and though there is some variation in the evidence from the statement in the answer, yet we thought there ought to be an issue upon it. (a) A respectable degree of obscurity is thrown upon it by the composition which has so long obtained in the parish. There is no ground to direct an issue on the wood in the hedge-rows; there is no distinction between copses and hedgerows; and therefore with respect to those the plaintiff must prevail. As to the wheat too there must be an account; for the mode of tithing which the defendants have insisted upon is clearly not good. The original mode of tithing wheat is by the sheaf; though there are cases to shew that if in the shocks it is tithable that way. As to the clover cut green, the case which has been cited from *Rolle's Abridgement* does not seem to turn upon a custom, but upon the sufficiency of other food: therefore there must be an inquiry as to that point. (b) With respect to the peas, there is no definite mode of tithing that article to be found in the books. We must therefore resort to principle; the tithe of it must be set out as soon as it comes into proper divisions or parcels, so as to let the tenth be seen and judged of and husbanded. But as to that fact, we have not before us sufficient to judge how far *it was in this case so separated from the other nine parts, as that it was practicable for the parson to take the tenth.

There must therefore be an inquiry as to that fact.

The court ordered the Deputy Remembrancer to take an account of what was due from the defendants *Richard Paine* and

(a) This species of *modus* has in some instances been allowed, *Ernst v. Watts*, 1 Wood's Decr. 305. *Reddington v. Nice*, 2 Wood's Decr. 62. in others disallowed. *Townley v. Tomlinson*, 3 Wood's Decr. 342. *Snowden v.*

Shotton, *ibid.* 369. It will be observed, however that there is a distinction in the several cases in the *quantum* of recompence to the parson.

(b) On this point, see *Stevens v. Aldridge*, 5 Pri. 334.

John Yalden of the tithes of all the barren cows, horses, oxen, heifers, sheep, and other unprofitable cattle agisted by them or either of them on their said farms and lands; an account of the wood cut by the defendants in their hedgerows from the 10th day of *October* 1791 to the time of the report; an account of the coppice-wood, underwood, and other wood cut in the said defendant's coppices and elsewhere, except in hedges, not used for fuel or purposes of husbandry; an account of the defendant *Richard Paine's* wheat and milk as prayed by the bill; and an account of the defendant *James Mills's* peas, with costs.

1798.

Mantell
v.
Paine.

The court further ordered the deputy to inquire, whether *John Yalden* had sufficient fodder to support his cattle used in husbandry without the green fodder in the pleadings mentioned, and whether any part thereof was consumed by any other, and what description of cattle, and whether he had duly set out his tithe of peas in the year 1793, in wads of a proper size; and whether the said tithe-wads were so separated from the other nine parts, as that the said plaintiff might take away the said tithe-wads with ease and convenience, and without interfering with the said defendant's nine-tenths thereof; and how and in what manner the said defendant did previously to and hath since the year 1793 set out his tithe of peas? And whether *Richard Paine's* fir plants were drawn before or after the day on which the bill was filed?

The court further ordered a trial at law on the two following issues:

First, "Whether the tithing of *Docking field*, or any part thereof, is or is not in the parish of *Frensham*."

Secondly, "Whether, from time whereof the memory of man is not to the contrary, there hath been a custom within the said chapelries or parsonages (as well as in several neighbouring parishes or districts), that every occupier of lands or tenements within the same having any pigs farrowed within the same to the number of seven or upwards, and not exceeding ten in number, should render and pay to the owner or proprietor of the tithes of the said chapelries or parsonages, or his lessee or farmer, or lessees or farmers, one of such pigs for or in lieu of the tithes of such number of pigs for that year, and that each and every such occupier should not [1513] render or pay any satisfaction in respect of the tithes of his pigs being under seven in number in any one year."

The judge to be at liberty to indorse any thing special; with the usual directions.

The court further ordered so much of the bill as prayed an account of the tithe of agistment of oxen against *Richard Paine* and *John Yalden* to be dismissed with costs; and the consideration of

1798. costs, and all further directions, to be reserved till after the return of the *postea* and the Deputy Remembrancer's report.

Sittings at *Westminster* before Lord *Kenyon* after *Trinity* Term. A. D. 1798.

Oxendon Bart. v. Skinner and others. [MS.]

On a possession of a portion of tithes for 250 years by the owners of the lands, the court presumed a grant of them before the 13th of *Eliz.* though tithes were not specifically mentioned in the title-deed under which the lands were claimed. *Domesday*, 96. 2. *Vide Thorpe's Regist. Roffen*, 342; 343. * *Qu. Eltham*.

THIS was an action to recover a deposit made by the plaintiff upon his bidding for the manor of *Elham* and lands at *Elham* in *Kent*, 549 acres of which were represented by the particulars of sale to be tithe-free.

Several objections had been made to the title, but they were all given up, except that which related to the tithes; as to which the facts were as follows:

In 1080 *Odo*, bishop of *Baieux*, held *Elham** in his demesne: upon his disgrace his lands were given to *William de Albineto*, a follower of the Conqueror, who had not only the manor, but also a portion of tithes, separate and distinct from the rectory. His son gave this portion, by the description of "my tithes of the town *Elham*," to the monks of *St. Andrew* of *Rochester*; and they had a grant of confirmation of the tithes from *H. 1*. The portion of tithes remained in the priory at *Rochester*; until 1540. *H. 8*. in the 33d year of his reign granted them to the dean and chapter of *Rochester*, but they never had possession of them, nor had any tithes ever been paid of the lands in question, except a *modus* of 20s. to the vicar.

†[1514] The manor of *Elham* escheated to the crown in 41 *E. 3*. and was granted by *R. 2*. to feoffees in trust for *St. Stephen's* chapel at *Westminster*, where it remained till the dissolution of colleges and chantries in 1 *E. 6*. He, in the 5th year of his reign, granted it with all its rights and appurtenances to lord *Clinton*; it was †reconveyed to the crown the next year; and then leased to sir *Edward Wootton* for eighty years. Some short time before the expiration of that term, *J. 1*. conveyed the reversion in fee with all rights and appurtenances to sir *Charles Herbert*; from whom it passed through several families to Mr. *Symonds*, the vendor: but there was no express grant of tithes in any of the conveyances.

The grant from *J. 1*. to sir *Charles Herbert* was lost; but, from the subsequent conveyances it was, probably, of "the manor of *Elham*, with all its rights, members, and appurtenances, in as ample a manner, as the king then held the same." No other lands in *Elham* appeared to be exempted from the payment of tithes either in kind or *sub modo*.

On the part of the plaintiff it was insisted, that here was no pretence of an exemption from payment of tithes: that the title to

them was in the dean and chapter of *Rochester*; and that if a grant from them was to be presumed, the tithes were not conveyed by the later deeds for want of express words; and therefore were in the crown, or the heirs of sir *Charles Herbert*.

1798.

Oxendon
v.
Skinner.

On the part of the defendants it was admitted, that this was not an exemption; but it was said that from a possession of 250 years, a conveyance from the dean and chapter of *Rochester* previously to the 13 *Eliz.* would be presumed, and that the general words were sufficient to convey the tithes, as profits of the lands.

Lord *Kenyon* (before whom the abstract and all the opinions taken on both sides had been laid) said, "All objections are admitted to be removed, except that which relates to the tithes. A court of Equity in these cases has a discretion, which I, sitting here, cannot exercise, as I am bound to tell the jury, that the plaintiff cannot recover his deposit, if there be a good title to these tithes; and on all the circumstances I think there is such good title. Here is possession of them for 250 years. Who can disturb the title? the rector cannot; these tithes have been severed from the rectory ever since the Conquest. If these tithes had been part of the rectorial tithes, no time would have barred the rector. Where is there any other right? The dean and chapter of *Rochester* might before the 13 *Eliz.* have alienated them. I am very clear, that on a possession of two centuries and a half, I must tell the jury, that they should presume any conveyance from the dean and chapter."

Law then suggested that there were no words of conveyance of the tithes.

Lord *Kenyon*. — I think the tithes do pass. The vendor will [1515] now convey as you please, and in what form of words you please. I think I should exercise my discretion in a court of Equity in the same way I do my judgment here, where I am bound by strict law, and must tell the jury, that there is a good title. Such a length of possession is a *positive prescription*, as they say in the civil law. The church of *Rochester* never had the tithes as of common law right. I must tell the jury that it is a good title, and that the plaintiff cannot recover. (a)

The plaintiff was nonsuited.

Tr. 39 Geo. III. A.D. 1799. Scac.

Hett v. Meads. [MS.]

THE defence set up in this case was, that the lands whereof the tithes were demanded were formerly part of the possessions of the abbey of *Revesby* in the county of *Lincoln*; and, the abbey being of

Lands formerly belonging to a Cistercian

(a) See *Rose v. Calland*, *infra* 1620., also 2 Ves. Jun. 625. *supra* 1430. and the cases *Scott v. Airey*, *supra* 1174. *Fanshaw v. Rotherham*, 1 Eden 276. *supra* 1177. *Strutt v. Baker*, there cited.

1798.

Hett

v.

Meeds.

abbey are
exempt
from tithes
while in the
manurance
of a tenant
for life un-
der a settle-
ment.

the *Cistercian* order, were therefore exempt from tithes when in the manurance of the owner.

That the lands had belonged to that monastery, and were capable of the privilege, was satisfactorily proved. But it appeared, that *Pennington*, one of the defendants, who claimed the exemption as having the lands in his manurance, was only tenant for life under a settlement with remainder in tail to *Susannah Meeds* his daughter, the wife of *Edward Meeds*, who were the two other defendants.

It was contended on the part of the plaintiff, that *Pennington* had not that quantity of interest in him which could support this privilege: that to entitle the lands to the exemption, the person occupying them must be the owner of the inheritance; he must have the same estate in him which the monastery had: that it was most clear, that the exemption could not be insisted upon, if they were in the hands of a lessee for life under a common lease; and there was no difference between such a lessee and a tenant for life under a settlement: that the latter had not a particle more of interest than the former: that in the case of *Wilson v. Reaman*, *Hardr.* 174. the question being, whether certain lands were discharged of tithes, as having been part of the possessions of an abbey of the *Cistercian* order; the court held, that a tenant for life or years is not within [1516] the statute, but that a tenant in tail who has an estate of inheritance is discharged *quamdiu propriis manibus, &c.* So *Brownl.* 44.

On the other side it was said, that upon no ground of common sense could it be argued, that a tenant for life is not entitled to the protection now claimed: that he, during his life, is as much the owner of the estate for the time being as any person could be: that if the tenant for life is not to be considered as the owner; there can be no owner whilst an estate for life is *in esse*: that there was a material difference between a person who is merely a lessee for life, and one who is tenant for life under a will or grant: that the latter has that very estate in him which the monks themselves had; for they were not the owners of the inheritance, they had only the enjoyment during their lives.

Lord Chief Baron. — It is admitted in this case, that a tenant in tail is entitled to the exemption which is claimed; but it is argued, that a tenant for life under a settlement is not. It was said, that the tenant must hold the lands as the monastery held them, else the privilege cannot attach. But it is impossible that the lands can now be holden precisely in the same manner as they were holden by the monastery: the monastery had them to them and their successors, but a man now has them to him and his heirs. But a fee simple may be divided into portions, into different estates for life, in tail, and remainder in fee. Where will be the difficulty

to say, that the tenants of each portion shall have the benefit as they succeed? The case of *Wilson v. Redman* has been cited; but from an extract from the answer in that case which I have been furnished with (a), the parties there appear to have had a fee simple; and therefore that not being a case in which it was necessary to decide the point, it cannot be considered of any authority. I confess, I cannot see any reason why a tenant for life should be excluded from the benefit any more than a tenant in tail, who, it is agreed, is exempt: there seems to be no reason why all the component parts of the estate should not be exempt as they severally come into possession.

1799.

Hall
v.
Meads.

[1517]

The court decreed unanimously, that the tenant for life was exempt, and dismissed the bill as against him, but without costs.

Tr. 39 Geo. III. A.D. 1799. C. B.

Wyburd v. Tuck,

Same v. Dyson,

Same v. Smith,

Same v. Holbrook. [1 Bos. & Pul. 458.]

DEBT for not setting out tithes under the 2 & 3 Ed. 6. c. 13. Plea, general issue.

If a composition for tithes is made by A. as proprietor, and he leases them to B., whose interest is afterwards put an end to by A. before any alteration is made in the composition, A. cannot determine it without a six months' notice. If A. execute a lease of tithes to B. on a day

At the trial of these four actions before *Eyre* Ch. J. the evidence on which several objections to the plaintiff's recovery were founded, and which were reserved by the Lord Chief Justice for the opinion of the court, was as follows:

The ancestors of the late *Stephen Jermyn* having been lessees under the dean and chapter of *St. Paul's* of the tithes of the parish of *Tottenham*, about sixty years ago leased them to one *Howard*, who held them for thirty years. On the 28th of *October* 1747 *Stephen Jermyn* was found lunatic; after which one *Lambly* became lessee under him, and on 30th *April* 1781 obtained a new lease for seven years from *Edward Tyson*, the then committee of *Stephen Jermyn*, after the expiration of which he held over until the year 1798. In *March* 1796 *Stephen Jermyn* died, upon which *Harriet Eyre* and *Margaret Udney*, the next in kin, took out administration. In *May* 1796 the dean and chapter of *St. Paul's* granted a new

(a) The words of the answer are as follows:

"And these defendants say, that by several meane conveyances and assurances in law derived from and under the said earl of *Lenox* and his wife, they, these defendants, do severally claim the several parcels they do hold as aforesaid, (that is to say,) this defendant *Lawrence Burton* did about 20 years since purchase to him and his heirs from one *sir Leonard Boswell*, who had it by descent, or otherwise, as they conceive, from

"*sir Ralph Boswell*, who had it from the lord *Dacre*, or some other who claimed it from the aforesaid earl of *Lenox*, the whole manor, rectory, and corn-mill of *Horton* aforesaid. And all these other defendants have since that time, (namely,) about eight or nine years since purchased to them and their several respective heirs and assigns, from the said *Lawrence Burton*, the several and respective premises they so severally hold and have held as aforesaid."

1799.

Wyburd
v.
Tuck.

subsequent
to their se-
[1518]
verance, but
previous to
their being
carried
away by the
landholder,
B. cannot
maintain an
action on
2 & 3 Ed. 6.
c. 13., as the
right to the
tithe vested
in A. im-
mediately
on sever-
ance.
Evidence
that the pa-
rishioners
have treated
with the
proprietor
for a com-
position, is
not alone
sufficient to
establish his
possession
of the tithes
in an action
on the sta-
tute.
Quære,
Whether if
one only of
two joint-
tenants ex-
ecute an
assignment
of a lease of
tithes, the
person
claiming
under that
lease can
support an
action for
not setting
them out?

lease of the tithes to *Harriet Eyre* and *Margaret Udney*, for twenty-one years, on their surrender of the old one. From them *Lambly* received notice, dated the 30th September 1797, to quit at *Lady-day* 1798, with which he complied; and an assignment of their lease was executed to one *Sperling* on 7th December 1797. *Sperling* executed a lease of the tithes to the present plaintiff, dated the 15th June 1798, to hold the same for seven years from the 25th March preceding.

During all the time that *Howard* and *Lambly* were tenants to the *Jermyn* family the same composition was paid to them by occupiers of lands in the parish, and *Lambly* was expressly forbidden by those under whom he held to make any alteration therein. *Sperling* having determined to raise the composition, gave a general notice to the parish in March 1798 that he was willing to treat with the landholders. In consequence of this a meeting was held by them, at which the terms proposed by *Sperling* were not acceded to.

In the case of *Smith*, that which was the subject of tithe was severed before, though not carried away until after the execution of the lease to him. The case of *Tuck*, the first defendant, was also differed from the others by the circumstance of the plaintiff's failing to prove the execution of the assignment to *Sperling* by *Harriet Eyre* jointly with *Margaret Udney*; and it appeared that *Tuck* was not present at the meeting of the parishioners. Upon the whole, therefore, the objections, as applying in the different cases, were, 1st, That as the plaintiff claimed under *Sperling*, to whom the assignment of the lease from the dean and chapter of *St. Paul's* had been executed by *Margaret Udney* only, he had not shewn a good title to support the action. 2dly, That a sufficient notice to determine the composition had not been given to the defendants. 3dly, That the plaintiff was not entitled to recover, as the tithe vested in *Sperling* immediately on severance.

A rule *nisi* having been obtained for setting aside the several verdicts which had been found for the plaintiff, and entering nonsuits in all the causes,

Shepherd Serjt. now shewed cause. — In answer to the first objection, it may be contended that this action being founded on a tort, it is not necessary for the plaintiff to make out his title, but that he may recover if he merely shew possession. It was so held in *Wheeler v. Heydon*, *Cro. Jac.* 328. In March 1798, *Sperling* gave notice to the parishioners, that he was willing to enter into a composition for tithes; in consequence of which a meeting was held, and at that meeting the only question in dispute was the amount of the composition to be paid; the right to the tithes was acknowledged to be in *Sperling*. Both in *Selwyn v. Baldy*, and *Hartridge v. Gibbs*, *Sussex assizes* 1682, *Bull.*

N.P. 188. (edit. 2d), it was holden sufficient by *Pemberton* C. J. for the plaintiffs, in actions on the stat. of *Ed.* 6., to prove their receipt of tithes from the other farmers in the parish, in order to entitle them to recover against the defendants. Proof of an agreement to pay a composition comes within the same principle. As to the second objection, it is to be observed, that the case of *Hewitt* and others v. *Adams*, *Dom. Proc.* April 19th, 1782 (a), by which the necessity of a six months' notice to determine a composition of tithes was established, proceeded on the analogy between the occupiers of lands paying a composition, and tenants of lands holding from year to year. Now if *A.* let lands to *B.* for a term of years, and *B.* underlet to *C.* from year to year, *A.* will be entitled to enter upon the lands at the expiration of *B.*'s term without giving notice to *C.* So if *A.* let lands to *B.* at *Michaelmas*, to hold from year to year, and *B.* underlet the same to *C.* at *Lady-day*, to hold in the same manner, it will be sufficient if *A.* give notice to *B.* at *Lady-day* to quit at the *Michaelmas* following, without regarding the sub-contract between him and *C.* In the present case *Lambly* is to be considered as tenant to the *Jermyn* family from year to year, and the occupiers of lands from whom he received the composition as his undertenants holding in the same manner. The notice, therefore, which was given to *Lambly* by the representatives of *Stephen Jermyn* must be sufficient to entitle them, and those who claim under them, to take the tithes in kind of the occupier of the lands. If this be not so, and the composition taken by *Lambly* is to bind the *Jermyns*, or those who claim under them, it may equally be contended that it shall bind the dean and chapter of *St. Paul's*, who were the original lessors. With regard to the third objection, the words of the statute are, that no person shall "take or carry away any such or like tithes, &c. under the pain of forfeiture of treble value of the tithes so taken or carried away." The right of action, therefore, does not accrue until the tithes have been carried away; and though the tithes in question may have vested in *Sperling* upon severance, yet the lease to *Wyburn* was executed previous to the time when they were carried away: by that lease all the tithes in the parish of *Tottenham* to which *Sperling* was entitled, in which must be included the tithes in question, vested in *Wyburn*; consequently, the latter was entitled to those tithes at the time when the wrong was committed. If, however, it should be thought upon general grounds that a lease of tithes will not convey such tithes as are actually severed at the time of its execution, it will be sufficient in this case to advert to the *habendum* by which the lease is made to take effect from the 25th day of *March* preceding the date.

1799.

Wyburn
v.
Tuck.

Supra 1204.

[1520]

(a) *Vide* Rayner on Tithes, 992.

1799.

Wylsham
v.
Tuck

Le Blanc Serjt., contra.—First, Admitting that it would be sufficient for the plaintiff to have proved peaceable enjoyment of the tithes without establishing any other title, yet it was not in his power to support his claim by evidence of enjoyment, since *Sperling* had never received any tithes, or come to any composition. Secondly, A certain composition having existed in the parish of *Tottenham* without alteration, as far back as the evidence went, the court will infer that it was made, not by *Lambly*, but by the dean and chapter of *St. Paul's*, or by the *Jermyn* family, from whom the plaintiff derives his title. Now if a rector, having made a composition, lease tithes, and the lessee make no alteration in the composition, when the tithes revert to the rector the occupiers of land will continue to hold under the composition originally made by the rector, and, consequently, will be entitled to notice before he can take the tithes in kind. The rules respecting notice to determine a composition are governed by the analogy to the notice to quit. Thus, if the *Jermyns*, having let land to *A.* from *Michaelmas* to *Michaelmas*, had granted a lease at *Lady-day* to *B.* for a term of years, and *A.* had continued to pay rent to *B.* till the expiration of his term, *A.* would again be tenant from year to year to the *Jermyns*, and would be entitled to notice six months before *Michaelmas*. For though *B.* might have put an end to the tenancy during his term, yet not having done so, it continues as at first created: if it were not so, that which was originally taken as a tenancy from year to year beginning at *Michaelmas*, would be put an end to at *Lady-day*. The case of *Hewitt and others v. Adams* is decisive of this point. Thirdly, The statute of *Ed. 6.* being made for the protection of persons in possession of tithes, the plaintiff cannot maintain this action against the defendant *Smith*. Immediately on severance the right to the tithes vested in *Sperling*, and *Smith* could only have justified carrying them away under a composition from him. If *Sperling* had been a spiritual rector, instead of a lay impropriator, and had died after the severance of these tithes, they would have passed to his executors, and not to his successor; *Sperling*, therefore, was the person injured by the tithes being carried away. The *habendum* in the lease, being from the 25th of *March*, has reference to nothing but the period from which the grantee is to hold, in order to ascertain the time when the lease is to expire, viz. in seven years from the 25th of *March*. If it were held to vest any title previous to the execution of the lease, it might be so framed that a lease for twenty-one years should give a right to tithes accrued fourteen years before.

[1521]

Eyre Ch. J.—On the first of the objections raised, and which applies to the case of *Tuck*, I have no difficulty, being of opinion that the verdict must be set aside and a nonsuit be entered, on the

ground of the plaintiff's having failed to make out his title, and not having proved himself to be in possession of the tithes. It was admitted on his part, that he must at least show himself to be in possession; and I am not prepared to agree, that because possession unaccompanied with other circumstances will be a sufficient title, that therefore possession, traced back by the plaintiff himself to that which turned out to be no title, will equally avail. The case is altered where the plaintiff proves his own bad title, and thereby shows that to be a wrongful possession which would otherwise have been good *prima facie* evidence to support his claim. However, I only mean to state my difficulty on that point, not to give a precise opinion upon it, as the case cited from *Croke* seems to establish a contrary doctrine. But I am of opinion that this plaintiff was not in possession, holding as I do that nothing will place a man in possession but a good title, which will draw to it the possession or the actual receipt of tithes, or that which is equivalent to receipt of tithes, viz. a composition. My brother *Shepherd* argued, that the receipt of tithes, like the receipt of rent and profits, amounted to possession. Actual use and enjoyment does so, I admit; but he was obliged to contend from thence that an agreement for a composition was equal to a receipt; and then to go one step further, and insist that a conversation tending towards an agreement, though it ended in a disagreement, was equal in effect to an agreement. By this chain of reasoning he endeavoured to prove that the plaintiff was in possession. His title, however, must depend upon his having or not having a lease; here, he had only a lease for a moiety, and therefore was not in possession, and cannot maintain this action.

With regard to the question of notice, which applies to all these causes, I have the more difficulty in speaking upon it, as I feel myself under the dominion of old prejudices. The judgement of the House of Lords, which has been alluded to, was a reversal of a judgment given by the court of Exchequer, and in which I concurred. I am to presume that the judgement of the House of Lords was right, but I am not master of the principles on which it proceeded. Tithes cannot, in my opinion, be well compared to land for any purpose, but particularly for the purpose of connecting a composition with the inheritance. It appears to me that the doctrine of binding the landlord by the interest of the tenant from year to year was founded on the distribution of land into a variety of interests, as that of the tenant and the reversioner; whereas it will not be found to apply to tithes so distinctly as to justify our adopting the same rules as are capable of being adopted with respect to land. In the case of *Hewitt* and others v. *Adams*, the defendants insisted in the Exchequer that they were not at all bound

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v.
Tuck.

[1522]

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Tuck.

to pay the tithes demanded; and we thought that where a defendant claims to withhold tithes adversely, all idea of composition must be put out of the case. The analogy between land and tithe does not appear satisfactory to me. Land is either taken on a holding from *Lady-day*, or from *Michaelmas*, or from some other time, and then notice to quit must be given accordingly. But, if a composition is to be determined on any just principles, the notice must be given from a period suitable to the nature of the tithes, and with a relation to the manure and cultivation of the land. There must be such a rule as will enable the tenant to cultivate his land in the manner most beneficial to himself, accordingly as he is to pay a composition or to pay in kind. I have great difficulty, therefore, in understanding on what ground a notice is necessary in the case of tithes; and I cannot at all comprehend how the owners of the land can be considered parties to a composition made with the occupiers of the land. Tithe in kind is the thing demised; the composition, therefore, begins with the interest of the tenant, is governed by that interest, and must, I should think, end with it. It has been argued that there may be a connection between the title of inheritance to the tithes and the composition; if there can be, I submit; it may be a necessary consequence of that judgement, the principles of which I do not understand. As some of my brothers concurred in that judgement, they will probably state on what ground it is, that a composition may be extended to the case of a new tenant claiming on the determination of the interest of a former tenant.

[1523] On the last point there can be no doubt. The *habendum* of the plaintiff's lease can only be considered as marking the duration of his interest, and its operation as a grant is merely prospective. That lease only vested in the plaintiff a right to the tithe which should accrue from the time of the grant. Now the title to the tithe in question arose immediately on the severance of the tithable matter from the land. Is it not clear that if a rector dies after the severance of the tithe and before its separation, and a new rector comes in, that the right to the tithe is in the old rector? The law gives to the new rector in that case all that the grant gave to the new lessee in this. *Sperling* therefore being entitled to these tithes at the time of the severance, and the person to complain if they were carried away, this plaintiff has no ground of action against *Smith*, in that view of the case.

Buller J.—My opinion will be principally founded on the two last points. On the first my mind still fluctuates. It has been contended, that for want of evidence to establish the joint execution of the deed of assignment by the two persons who took out administration, the plaintiff cannot recover against *Tuck*. But

this is the case of a tort; and I am not quite satisfied that in such a case, if the plaintiff declare as solely entitled and prove himself to be entitled to a moiety only, he may not recover for that moiety. It was so held in the case of *Nelthorp and Farrington v. Dorrington*, 2 Lev. 113. However, were I to rely on this point much, I should wish for further consideration before I came to any conclusion.

1799.

Wyburd
v.
Tuck:

The second point appears to me to have been fully settled by the decision in the House of Lords. That decision was, that the same notice must be given to determine a composition, as must be given to a tenant of land holding from year to year. The other point alluded to by my Lord Chief Justice was also raised in that case. The landholders contended in the first place, that they were not obliged to pay the tithe claimed; and 2dly, that if they were, the plaintiff was not entitled to recover, because there had been a previous composition, the notice to determine which was not sufficient. There was a doubt on the woolsack at that time, whether both, or only one, or which, of these questions should be put to the judges. At last the question put was, whether the notice given was sufficient to determine the composition, and the judges were unanimously of opinion that it was not; and said expressly, that a notice to determine a composition for tithe ought to be given with analogy to the notice given in a holding of land. By that decision we are bound; nor do I think any of the difficulties it has been supposed likely to produce will ever occur. It has been argued that if the plaintiff, as deriving title from the *Jermyn* family, is bound by this composition, the dean and chapter of *St. Paul's* will also be bound by it. That conclusion, however, is questionable, and may or may not be true according to the circumstances. If the interest of the lessee under the dean and chapter with whom the composition was made expire, the dean and chapter will not be bound. But, if a lease be granted for a long term of years, and the dean and chapter take an assignment of it, though as to many purposes that will operate as a surrender, yet with regard to the interest of third persons it will not. All depends on the single question, whether there be a continuance of that interest under which the composition was first created? If that continues, the composition continues; if that be at an end, the composition is at an end also. It has been said that there may be a difference between a composition with the owner and a composition with the occupier of the land. If, however, the interest of the occupier cease, the composition made with him, unless under particular circumstances, will be at an end. But no question of that kind arises here, for it does not appear but that the occupiers in all the stages of the case were the same. The difficulty would be, if we were to

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Tuck.

suppose a composition to take place from *Michaelmas* with a tenant who is in on a *Lady-day* bargain. In that case the composition would be either during the interest of the tenant, or from year to year generally. If the former, notice must be given for *Lady-day*; if the latter, a question might be raised whether the composition should not continue to the end of the year, though the interest of the tenant ceased on the expiration of his lease. That may be a nice question, but it does not arise in this case. There may be difficulties in point of convenience as to the time at which a composition shall commence, but those difficulties are for the consideration of the parties when they make their agreement. On the facts of the present case the composition must be taken to be continuing, inasmuch as the plaintiff claims under those persons with whom it appears to have been made.

The last point has been fully and ably stated by my Lord Chief Justice, and I entirely concur with him.

[1525] *Heath J.* — The objection to the plaintiff's recovery, that there was no notice to determine the composition, must prevail; because the title under which he claims is derived from *Sperling*, in whose time the composition existed, and has not been dissolved by the parties. In the House of Lords the analogy between land and tithes was considered, and the opinion of the Judges was founded on the inconvenience which the occupiers of lands must sustain if a composition could be put an end to without notice. It was considered that by notice they would be enabled to cultivate their lands in such a way as would best answer to them when called upon to pay tithes in kind, and that it would be very unjust to deprive them of this advantage. As to the question, whether this plaintiff can recover when one only of two joint-tenants has executed the lease, I wish to give no opinion, as my brother *Buller* has cited a case in favour of the plaintiff.

Rooke J. — It appears from the facts of this case, that as far back as the evidence went, tithes had never been set out in the parish of *Tottenham*. It is to be wished, therefore, that these defendants should not be liable to actions for not doing that which never appears to have been done within the parish; and in point of law, I think that they are not liable. As the lessees of the tithes under the *Jermyn* family were desired by them not to raise the composition, it must be considered as having been made with that family. Now Mrs. *Eyre* and Mrs. *Udney* being the representatives of that family, may by implication be considered as having also desired that the composition should not be raised. And though they might have retracted the intimation originally given, yet not having done so, the composition must remain in force till notice be given to the landholders of an intention to put an end to it.

The occupier may be induced by notice to alter the course of husbandry, and it would be hard to make him liable in a penal action where that notice has been withheld. On the principles of the decision in the House of Lords, and on the general justice of the case, I think a nonsuit should be entered.

1799.

Wyburd

v.

Tuck.

With respect to the objection, that the assignment of the lease was executed by one only of two joint-tenants, it strikes me that it would be hard to allow the law as laid down in the case in *Levinz* to prevail; since it would be calling on the defendant to plead in abatement, or be liable to two more actions.

On the third point I entirely concur with the rest of the court: the right to the tithes accrued immediately on severance, and at the time when the lease was executed there was nothing but a possibility of action in case they should not be set forth, which possibility could not be assigned. (a) [1526]

Rule absolute.

39 Geo. III. 1799. Summer Ass. Chelmsford.

Moyes v. Willett, clerk. [3 Esp. N.P.C. 31.]

CASE against defendant, rector of the parish of *Stamford-le-Hope* in the county of *Essex*, for not taking away his tithes.

Action on the case will not lie

Plaintiff was a farmer in the parish of which defendant was incumbent, and it was proved that when the grass was cut he had set out the tithe in the swathe.

against the parson for not taking away his

Buller J. ruled that plaintiff could not recover; that before the plaintiff could entitle himself to damages for not taking away the tithes, it should appear that they were properly set out, and in a fit state for the parson to take them; that by a late determination of the court of Exchequer (b) the tithe of hay was not to be set out in the swathe, but in the cock; that the action therefore was not maintainable.

tithes, unless they have been properly set out. It is therefore not maintainable for not taking away tithe of hay where it

was set out in the swathe.

H. 40 Geo. III. A.D. 1800. Scac.

Awdry v. Smallcombe. [MS.]

THIS was a bill by the lessee of the dean and chapter of *Salisbury*, the appropriate rectors of the rectory and parish church of *Melksham* in the county of *Wilts*, and his sub-tenant, against two occupiers of lands within the tithings of *Beanacre*, *Whitley*, and *Shaw*, in that parish, for an account of the tithes of peas and potatoes.

The endowment places the vicar in the same situation as the rector is in at common law; and,

(a) Upon the point of notice, see *Adams v. Waller*, *supra* 1204. 1229. n.

(b) See *Knight v. Halsey*, *infra* 1561 & *Newman v. Morgan*, 10 East, 5. *infra*.

1800.

Audry
v.
Smallesdale.

unopposed
by cogent
evidence of
contrary
usage, must
prevail.

The defendants by their answer admit the title of the plaintiffs as stated in the bill; they admit also that the plaintiffs are entitled to some tithes; and that they, the defendants, had such tithable matters as constitute the subject of the suit: but they insist that those articles of tithe belong to the vicar of *Melksham*, and not to the rector; and they set forth several terriers, hereafter noticed, (the endowment not being then discovered,) upon which they ground the vicar's title. They then state, that their peas were hand-gathered by persons employed by them for that purpose, and were sold in the green market; and that their potatoes were used part in their own families, and that the other part was sold for fattening pigs and culinary purposes.

On the part of the plaintiffs the depositions of several witnesses were read to prove the actual permanency of both of these articles of tithe by the rector; but most of the witnesses spoke as to the usage in this respect in the chapelry of *Seend*. The entries in the books of former lessees of the rectory, of the receipt of these articles of tithes, were likewise read in evidence for the plaintiffs.

The first piece of evidence produced on the part of the defendants was the endowment of the vicarage, the *ordinatio vicarie de Melkesham*, in 1249, which was taken from the registry of the diocese of *Sarum*, and was as follows: “ Et est ordinatio et taxatio
“ vicarie de *Melkesham* facta a venerabili presule *W.* Dei gratia
“ *Sar.* episcopo domino *Roberto* decano et capitulo ejusdem loci
“ die Sabati post Cineres anno Domini m^occ^oxl nono in capitulo
[1527] “ existentibus personis archidiacono et canonicis infra scriptis
“ videlicet quod cum vicarius ejusdem ecclesie qui pro tempore
“ fuerit curam et sollicitudinem animarum habere debeat parochie
“ matricis ecclesie de *Melkesham* et omnium capellarum parti-
“ nentium ad eandem et tam matri ecclesie quam capellis pre-
“ dictis honeste et competenter debeat deservire ac pro ecclesia
“ et capellis suis in omnibus episcopalibus et archidiaconalibus
“ ordinariis et consuetis respondere et satisfacere teneatur reci-
“ pere debet et habere omnes proventus et minutas decimas et
“ ceteras singulas portiones et consuetudines quocunque nomine
“ censeant tam matricis ecclesie et parochie de *Melkesham* quam
“ suarum adjacentium capellarum plene et integre sine aliqua
“ diminutione preter decimas bladi fabarum pisarum et feni et
“ preter dominicum et tenentium redditus ac consuetudines
“ eorundem que ad usus commun. *Sar.* remanebunt. Item quod
“ vicarius habere debet domicilium et ortum que tenuit *Robertus*
“ capellanus et fenum debet habere ad sufficientem sustentationem
“ unius equi, &c.”

The terriers stated in the answer were then read; the first of which, dated in 1619, and signed by the then churchwardens, stated,

that "there belonged to the vicarage all manner of tithes and other dues, except corn and hay." The next, dated in 1671, and signed by the vicar and churchwardens, recognizes the endowment, and adopts the very words of it. Another, dated 21st December 1704, and signed by the vicar, churchwardens, and four other inhabitants of the parish, gives to the vicar "One messuage, dwelling-house or tenement, with an orchard, garden, and backside thereto adjoining and belonging, together with the churchyard of the said parish of *Melksham*. And also all the small tithes and dues of the said parish; and likewise the sum of six pounds one shilling and eight-pence, issuing and payable yearly to the vicar of *Melksham* aforesaid out of the parsonage, by the owner of the great tithes of the said parish of *Melksham*."

1800.

Audry
v.
Smallcombe.

Here the plaintiffs read in evidence a terrier of 20th December 1704, of the chapelry of *Sand*, signed by the vicar, the two chapelwardens, and one *Ambrose Audry*, which assigned to the vicarage "all small tithes whatsoever, viz. all tithes except the tithes of corn, hay, peas, and beans."

In order to shew the vicar's general title to these tithes, the defendants offered to read in evidence a decree made by this court in a cause of *For v. Ratty*, which was a bill filed by former vicar of *Melksham* against an occupier in 1729 for an account of tithes, and the depositions of the witnesses in that cause. The competency of this evidence was objected to by the plaintiff's counsel, inasmuch as it was *res inter alios acta*, the rector or his lessee not being a party to that suit. However, as this point was not pending for the judgement of the court in the case of *Illingworth and Leigh*, it was agreed to admit the evidence *de bene esse*.

Supra 627.

[1528]

Infra 1615.

The defendants then read the depositions of some witnesses taken in the present cause, to negative the receipt, or even demand, of these articles of tithe by the rector or his lessee.

The case was argued by *Platzen, Richards, and Martin*, for the plaintiffs, and by *Leycester and Short* for the defendants; and the judgement of the court, after a few days' consideration, was, on Monday 10th February 1800, delivered by the

Lord C. B., who, having stated the pleadings, said — This case is reduced to a question between the rector and the vicar: and *prima facie* the rector is entitled to all the tithes of the parish; and if the vicar would take any part of them from him, he must either produce an endowment, or give such evidence of usage as presupposes an endowment. When the vicar produces an endowment, then the situation of the parties is reversed; the *prima facie* title to the extent of that endowment is in favour of the vicar; and if the rector would claim any of the articles comprehended within the terms of it, the *onus probandi* is thrown upon him. In such case

1800. it is incumbent on the rector to give such clear and cogent evidence of a usage in the parish in his favour, with respect to the articles he would insist upon, as shall narrow the terms of the endowment, and induce a presumption that the parties interested in the tithes had come to some new agreement, that some different arrangement had been made with respect to the distribution of the tithes between the date of the endowment and the disabling statute of queen *Elizabeth*. The evidence of usage given by the plaintiffs in the present case is very unsatisfactory. Nor indeed has any strong negative evidence of usage been given on the part of the defendants; there is no preponderancy of evidence as to that on either side. The non-payment of the tithes of peas to the rector, probably, arose from a mistaken notion (which obtained till the case of *Sims v. Bennett* in the year 1766) that that article of tithe gathered green was a small, and not a great tithe, and consequently belonged not to the rector, but to the vicar. In the absence, therefore, of all evidence of usage, we must resort to the endowment itself, and that gives every thing to the vicar except the tenths of corn, beans, and peas, and hay. And the recognition of that endowment in the terrier of 1671 is strong evidence to shew, that the usage of the parish was at that time conformable to it. As to the evidence of the suit of *For v. Ratty*, it is unnecessary for us to decide upon the competency of it, because we are of opinion, that were it never so competent, it is totally irrelevant on the present occasion: the subject of that suit makes no part of the subject of the present suit. The vicar did not claim the tithes of peas and potatoes in that suit: they are not to be found among the articles which he specifically enumerates as belonging to him: no right was ever set up in that suit in the rector of this parish, nor was his title ever in issue. The main question of that suit was between the vicar of *Melksham* and the rector of *Whaddon*, whether a piece of ground called *Hey*, lay in the parish of *Melksham* or in the parish of *Whaddon*; whether the tithes of it belonged to the vicar of the former parish, or the rector of the latter. That cause therefore does not bear at all upon the present; for there was no dispute whether the particular articles now in question were or were not payable to the vicar of *Melksham*.

Under these circumstances, therefore, we think that there must be a decree for the plaintiffs as to the tithes of peas, and that the bill must be dismissed as to the tithes of potatoes, they appearing to us manifestly to belong to the vicar. But we do not think this a case in which costs ought to be given on either side.

H. 40 Geo. III. A.D. 1800. In Ch.

1800.

Foxcroft v. Paris and others. [MS.]

Foxcroft

Paris.

S. C.
5 Ves. 221.,

much more
fully re-
ported.

Objection
to the de-
scription of
the lands in
respect of
which an
exemption
from tithes
is claimed,
as insuf-
ficient or
uncertain,
must be
made by
way of ex-
ception to
the answer;
it comes too
late at the
hearing.

Sed Qu.

*[1530]

THIS was a bill by the plaintiff, as rector of *Beauchamp Roothing*, in *Essex*, for an account of tithes. The defendants were seven in number: four of them were the tenants, and the other three were the owners, of the lands whereof the tithes were demanded.

The defence set up by the answers was, that two-thirds of the tithes formerly belonged to a religious house, which was surrendered to *Henry* the 8th, and afterwards dissolved by the 31st of that king; and from the crown, title was deduced to the three defendants, who were the owners of the lands; that is, to express it more *correctly and satisfactorily to the learned reader, the defence was that two-thirds of the tithes belonged to the defendants, the owners, as portionists, and that the plaintiff was entitled only to a third part. In the answers, no manner of description was given of the lands as to which this portion was claimed. The defendants, the tenants, merely stated, that *they submitted to be examined upon interrogatories touching the quantity and description of the said lands*. And the defendants, the owners, stated, that the *other defendants held and occupied, as their lessees or tenants, certain farms, lands, and premises within the said rectory; and that a considerable part thereof, consisting of 490 acres or thereabouts (as they computed it), were (as they believed) exempt from the payment of tithes, or any compensation in lieu thereof, except as to one-third of the tithes*.

But the defendants, by their evidence, identified the particular lands as to which the defendants, the owners, claimed the portion of two-thirds of the tithes; and the proofs also established their title to such portion.

At the hearing, it was insisted by the plaintiff's counsel that the plaintiff was entitled to a decree for the full tithes of the land in question, by reason of the uncertainty of the defendant's answers; the rule being, that whenever any defence is made in abridgement of the common-law right of the rector, the lands to which such defence applies must be distinctly set out and described in the answer: 1st, for the sake of the plaintiff himself, that he may meet the case made by the defendants with proper evidence; 2dly, for the sake of his successors, and of the parish, that the decree may settle the question, and prevent further litigation. And to this point they cited *Wood v. Wray*, 3 Anstr. 838.*; and *Scott v. Allgood*, 1 Anstr. 16.†

* Supra
1457.

† Supra
1369.

The *Master of the Rolls* said, that the plaintiff ought to have excepted to the answers of the defendant, if he considered that they did not describe the lands in question with sufficient certainty to enable him to meet the defence by evidence; that not having done so, he had waived his objection; and that it would be the greatest

1800.

Foxcroft
v.
Paris.

injustice to permit him to turn the defendant round upon that objection at the hearing.

His Honour therefore decreed (*b*), (the plaintiff waiving an issue,) that the defendants, the occupiers, should, in respect of the lands identified by the evidence, account to the plaintiff only for one-third of the tithes.

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[1831]

E. 40 Geo. III. A.D. 1800. Dom. Proc.

Knight v. Halsey.

S.C.
8 Bro.
P. C. 233.
(2d edit.)
2 Bos. &
Pull. 172.
7 T.R. 86.
Hops are
tithable by
the mea-
sure after
they are cut
from the
bind; and
a custom
to set out
the tithe of
them by the
tenth row
if equal,
and by the
tenth hill
where the
rows are
unequal,
leaving the
binds uncut
and the
poles stand-
ing, is void.

THIS was an action on the case, brought by the plaintiff in error, in the King's Bench, against the defendant in error, as farmer of and entitled to the tithe of hops within the parish of *Farnham*, in the county of *Surry*, for not taking away the tithe of hops from a certain close in that parish, whereof the plaintiff was occupier.

The declaration consisted of two counts: the first stated generally the plaintiff's occupancy of the close in question, and the defendant's right to the tithes, and that the latter neglected to take them away after they were duly set out. The second varied from the first, by averring, that the tithe was set out "according to the usage and manner of tithing hops in and throughout the said parish lawfully used."

The cause was tried before *Hotham* Baron, and a special jury, at the *Surry* Spring Assizes, when a verdict was found for the defendant, under the direction of the learned judge; to which direction a bill of exceptions was tendered, stating, that at the trial the counsel for the plaintiff in error gave in evidence, "That the plaintiff in error, on the 1st of *August* 1795, was occupier of the close in question, whereon hops were then growing, and that the defendant in error was the farmer of it, and entitled to the tithe of such hops; that within the parish and rectory of *Farnham* aforesaid, for above sixty years before the 12th of *July*, in the 4th year of the reign of the late king *James* the 2d, when the tithes of hops were not compounded for, the manner of setting out tithes of hops within the said parish was as follows; that is to say, the occupiers, owners, and proprietors of lands within the said parish planted with hops, have used to set out every tenth row, whenever hops have been planted in equal rows, and where the same have not been planted in equal rows,

(*b*) His Honour also was of opinion, that the defendants had made out a *prima facie* title in their landlord as to the two-thirds. 5 Vex. 231. The cases cited for the plaintiff were, *Gough v.*

Collins, *supra* 1294.; for the defendants, *Stratt v. Baker*, *supra* 1430.; *Scott v. Airey*, *supra* 1174.; *Edwards v. Lord Vernon*, *supra* 1177.; *Mawbey v. Edmead*, *supra* 1265.

1800.

Knight
v.
Halsey.

[1532]

“ every tenth hill of the said hops so growing in the said lands,
 “ and thereby to separate and divide the tenth part from the other
 “ nine parts of the said hops; and there to leave the same standing,
 “ with the binds uncut, for the use of the impropiator of the said
 “ rectory, or his lessee or farmer for the time being, to come upon
 “ the said lands, and in a convenient time there to cut the said
 “ binds of the said tithe hops so set out as aforesaid, and to pick
 “ the said tithe hops, and carry away the same: that from the
 “ time when the occupiers used to set out their tithe in manner
 “ aforesaid, till the year 1795, when the defendant became farmer
 “ thereof (being a period of 100 years), the tithe of hops was
 “ compounded for throughout the parish at the rate of 20 shillings
 “ by the acre: that the defendant is entitled to tithe of hops of
 “ the close in question, being field land: that in the said year, 1795,
 “ the said hops so then growing in the said close were planted
 “ in unequal rows: that on the 17th day of *August* 1795, the
 “ plaintiff gave the defendant notice that he was about to set
 “ out the tithe in kind: that in consequence of a notice from
 “ the defendant, that he would take his tithe in kind, the tithe
 “ thereof was set out accordingly in the said close called *Round*
 “ *Close*, by every tenth hill, leaving the binds uncut, and the tithe
 “ marked with a hole dug in the ground, and was fairly set out, and
 “ all the hills not bearing hops passed over and not counted: that
 “ on the 2d day of *September* following, the plaintiff gave the de-
 “ fendant notice, in writing, that the tithe in question was so set out:
 “ that on the 21st day of *October* following, the plaintiff gave a
 “ notice, in writing, to defendant to take away the said tithe so set
 “ out as aforesaid: that the defendant did not take away the same,
 “ but left the tithe so set out standing, with the binds uncut, in-
 “ cumbering the plaintiff’s land for the space of time in the said
 “ declaration mentioned: that tithe of hops may be fairly set out
 “ by the tenth hill; that such setting out is the most convenient
 “ mode, and least liable to fraud; and the general manner of
 “ manuring hop grounds, is to spread the manure over the whole
 “ ground; for many hills will be weak, and many will die, and it
 “ is impossible to foresee which: but hops will sometimes inter-
 “ mingle on poles on the same hill, but seldom between one hill
 “ and another; and where they happen to do so, they are easily
 “ separated, and without any mischief or injury thereto: that the
 “ manner of picking hops in the parish of *Farnham*, is not to pick
 “ them into measures of bushel each, but they are picked in the
 “ first instance into three sorts, called the *bright*, the *middling*,
 “ and the *brown*, of different qualities and values; which three
 “ sorts grow upon the same bind; viz. the bright are the finest and
 “ best, the middling the next best, and the brown of inferior qua-

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*[1533]

lity: that the difference in value between the bright and brown,
 is in the proportion of 7*l.* 10*s.* for the bright, and 3*l.* 3*s.* *for
 the brown, *per* hundred weight: that the hops are thus divided
 into three sorts, and the first picking from the binds into three
 different bags or baskets at the same time, each containing upon
 an average eight or ten bushels; and their respective contents
 are denoted by small round black specks or streaks made on the
 sides thereof at different distances; but the bags or baskets are
 not all of the same measure: that the pickers pick in families,
 as it is called; *viz.* in parties in unequal numbers, some of
 which families pick much quicker than others; but all cease
 picking at the same time, either on account of the approaching
 rain, which would soon spoil the hops when picked, or at meal
 times: that the average price of picking to be paid by the
 planter is 2*d.* *per* bushel to each family of pickers, separately
 and distinct from the others: that hops in the parish of *Farn-*
ham are never measured, the pickers being paid according to
 the quantity denoted by the specks or streaks aforesaid; but
 when the bags are full, or at the respective times of giving over
 work, the hops that are picked are immediately turned over from
 the bags to a surplice or sheet, and carried from the ground to
 the part to be dried: that it would be extremely prejudicial to
 measure them after picking, because it would render it inconve-
 nient to pick them into three sorts as aforesaid; and in such case
 it would employ the pickers an hour and a half extra. The
 flower of the hops would be bruised, and the bright hops turned
 to brown, to the great injury of the planter, as well as to the
 tithe owner himself; whereas by setting out the tithes by the
 hill, with the binds uncut, in manner above-mentioned, the
 tithe owner, as well as the planter, may pick his hops into three
 sorts as aforesaid, at his own convenient time, and enjoy all the
 other conveniences before enumerated, as well as be enabled to
 take a tithe of the binds together with the hops at the time of
 picking. It also appeared upon the reading of the answer of the
 plaintiff in error to a bill filed against him by the defendant in
 error, in the court of Chancery, that the plaintiff in error had
 admitted that he believed it might be true, that the introduction
 and first cultivation of hops in the said parish of *Farnham*,
 and elsewhere in this kingdom, were, with reference to what is
 termed the legal time of memory, modern, and within the time
 of memory."

[1534]

Judgement having been given in the King's Bench for the de-
 fendant, in pursuance of the verdict, the plaintiff brought his writ of
 error; and having annexed the bill of exceptions to the record, and
 assigned the common errors, submitted that the judgement below

was erroneous, and that a *veneri facias de novo* should be awarded for the following, among other reasons:

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1. Although the common law does in general prescribe, that there should be a uniform mode of setting out tithes where a particular mode of setting out is established by custom, yet the custom of a particular place may authorise or require a different mode from that in general prescribed by the common law, if such custom be in itself reasonable. And it has never yet been decided, that the mode of setting out tithe of hops by the tenth measure, as contended by the defendant in error, is the only legal mode of setting out such tithe; nor is the particular mode contended for by the plaintiff in error unreasonable.

2. It has been determined that the tenth land of grain may be set out standing for the tithe of grain; viz. in *Hide v. Ellis*, *Hob.* 250., *Supra* 432. it is stated, as coming from the court, that in many places they set out the tenth acre of wood standing, and so of grass.

3. The evidence in the former cause of *Chitty and Reeves (a)*, and in the litigation between the present parties, is uniform, to shew that in the parish of *Farnham* the tithe of hops, when set out, was set out by the tenth row, if equal; else the tenth hill. How long that custom or usage had actually prevailed it is not now possible to make out; but if it was not an immemorial custom, (which is not so devoid of foundation as has been generally supposed), it might, at least, have had its commencement at a time when it was competent to the rector and vicar, with the consent of the patron and ordinary, to make a binding agreement that the tithe should be set out in the way it has been. It was on supposition of some agreement so made, accompanied with the usage, that the court of Exchequer, in the suit instituted some time since by the vicar, claiming the tithe of hops planted in fields, adjudged the tithe of hops to belong to the rector, though the vicar took those in the rest of the parish. *Infra* 1583.

4. The evidence adduced by the plaintiff in error proves two essential things; first, that the tithes of hops may be set out fairly by the tenth row or hill; and, secondly, that the obliging the occupiers of lands in *Farnham* (where hops are in the picking of them managed in a peculiar manner) to set out the tithes of the hops by measure would be difficult, attended with additional expence and great delay, and very injurious to the hops themselves, and materially affect their prices, when sold. [1535]

5. The prior cases of *Gee v. Perch**, *Bliss v. Chandler*†, and *Walton v. Tyers*‡, were totally different from the present; and the defences in them were all so unfounded, and the manner in which

* *Supra*
563.
† *Supra*
625.
‡ *Supra*
841.

(a) 1 Wood's Decr. 251. Bun. 20.

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the defendants themselves had before set out their tithes was such, that the court could not do otherwise than decree an account of the tithes as having been subtracted; and no one of the cases made it necessary for the court to declare, that by law hops were to be picked before the tithes were set out.

On the other hand, in support of the judgement, the following, amongst other reasons were urged:

1. That the common law rule for setting out the tithes of hops in many instances has been determined, and more recently, after the most solemn argument, hath been adjudged, and is now clearly settled, that the tithe shall be set out by measure after the hops are picked from the bind or stem; for that hops are not tithable until after they are picked, at which time, but not before, the tenth part is severable from the other nine parts.

2. To the validity both of a *modus decimandi* being a compensation which must have originated prior to the time of legal memory, and also of a composition real being a composition which may have originated since that era, but not after the restraining statutes passed in the reign of queen *Elizabeth*, a consideration or *quid pro quo* is indispensably necessary. A compensation, be it either ancient or modern, whereby part of the thing is given in lieu of the whole, or whereby a thing is given in a less perfect state than the law enjoins it to be given, unless something be added to make it equal to the value of the real tithe, carries internal evidence to destroy itself, and is considered as being rank, and therefore void. The compensation here contended for by the plaintiff in error, whether commencing in ancient or modern times, whereby nothing more than the tenth part of the hops before picking is to be given, without adding any thing to make it equal to the greatly advanced value of the real tithe, which the law enjoins shall be set out after picking, or for the considerable costs the occupier incurs in bringing the article into the more perfect state, and to the benefit of which the tithe-owner is by law entitled, clear of all expence, must be *felo de se*, and, as being rank, is void.

[1536] 3. A custom must be presumed to be as old as the time of legal memory; and when that presumption is refuted by any circumstance that shews that it could not have existed during the whole of that period, the custom is destroyed. No mode for tithing hops can have existed from the time of legal memory, because the cultivation of hops within the kingdom is of a date long subsequent to it; and of this all the courts of *Westminster-hall* have taken judicial notice, and, in consequence, have uniformly decided against all customs that ever have been attempted to be set up relative to the tithing of hops.

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4. The mode of tithing contended for by the plaintiff in error cannot be supported as a local custom peculiar to the parish of *Farnham*; because, besides the evidence which the records of the judgements of courts of law furnish against its antiquity, generally, throughout the kingdom, it is stated, on the bill of exceptions, that the introduction and first cultivation within the parish and rectory of *Farnham* is, with reference to the time of legal memory, modern, and within the time of memory.

5. Notwithstanding the evidence adduced by the plaintiff in error, these facts cannot be denied, that the hops on different hills, as well as in different rows, are so unequal, both in quantity and quality, that the tenth of either of them bears no proportion to the tenth of the whole produce: that tithing by the hill or row is liable to great frauds: that taking the tithe by either of these modes would, in all cases, be very inconvenient, and in many quite impracticable; whilst, on the other hand, the fairness, convenience, and justice of setting out the tithe by measure, after picking, in experience have been so fully proved, as to render this mode of tithing part of the common law of the land.

6. A custom to set out the tithe by the tenth row, if equal, or by the tenth hill, if unequal, ought not to have been permitted to be proved in this cause, because the plaintiff in error has not in his declaration stated that there was any such custom, or that he had set out his tithes, which are the subject of his complaint, according to any such custom; therefore, the existence of such custom could have no relation to the matter in issue between the parties.

This case was argued the 25th and 27th of *February*, by *Mansfield* and *Adams* for the plaintiffs in error; and by the *Attorney-General*, *Sir John Mitford*, and *Hall*, for the defendants in error. After the argument, the question put to the Judges was, whether, upon the matter set forth in the bill of exceptions, the direction to be given to the jury ought to have been to find for the plaintiff or for the defendant?

[1537]

The Judges desired time to consider of their opinions, and on two subsequent days delivered them *seriatim*, there being a difference upon the bench. *Rooke J.* was of opinion that the direction ought to have been in favour of the plaintiff, and *Chambre Baron*, *Le Blanc J.*, *Lawrence J.*, *Thompson B.*, *Grose J.*, *Heath J.*, and *Macdonald Ch. B.*, held that it was rightly given for the defendant.

Rooke J. — The question proposed by your Lordships is, whether, upon the matters set forth in the bill of exceptions, the direction to be given to the jury ought to have been to find for the plaintiff or for the defendant?

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According to my view of this cause, the answer of this question must depend on the opinion the jury would have formed as to the facts here stated. If the jury were satisfied that the facts stated in the bill of exceptions were sufficiently proved, my opinion is, that they ought to have found a verdict for the defendant. Though I am so unfortunate as to differ from the Ld. Ch. Baron and all my brethren on this question, yet I flatter myself that we do not materially differ as to first principles, but rather as to the application of them. They argue, that where no practice has prevailed to the contrary, the general law of tithing hops is by the measure; that a strict legal custom must be immemorial; that according to the doctrine laid down in our books, hops are of modern cultivation, as an article of husbandry, and cannot be the subject of a strict legal custom. But I think —

1st. That the general law of tithing hops has been established with a cautious regard to the usage of such particular parishes wherein a reasonable and convenient usage has obtained.

2dly. That such restriction on the general law is not illegal, nor contrary to the principle of tithe law.

3dly. That the usage set up by this parish of *Farnham* may be supported without violating any legal principle.

1. As to the general law of tithing hops.

The wild hop is probably an indigenous plant; but though indigenous, if it first became an article of cultivation within time of legal memory, it seems agreed, that no customary usage as to tithing it can be supported against the general rule of law. In the case of *Crouch v. Ridsen* (as reported in 1 *Sid.* 443.) the court deny that there can be a *modus*, by way of prescription, to pay so much for tithe hops, and say, they will take notice that hops are not so ancient, but were used in beer only of late times, notwithstanding the records cited by Lord Coke & *al. contra*. In justice to Lord Coke's memory it should be observed, that the passage alluded to in Lord Coke's work is misrepresented by the reporter. — Lord Coke cites 12 *Ed.* 4. c. 8. as to those who had purchased letters patent to be correctors of ale, beer, wine, &c.; and has this note in the margin of the 4th *Inst.* 262. — “*Nota.* By this it appeareth that beer is not of such late time as some suppose. — See also *Rot. Parl.* 4 *H.* 4. No. 53. Beer and ale mentioned to be then in *Calais*. Beer is a *Saxon* word, *bier*: and beer is within the word *cervisia* in the ancient statutes; for it is but as the putting a new button to an old coat, viz. hops to malt and water, to make it continue the longer.” According to this passage, the putting hops to beer was considered by Lord Coke as of modern practice in his time; whereas the reporter represents him as saying the contrary. The same case (*Crouch v. Ridsen*) is reported 1 *Ventr.* 61., and the re-

porter makes the court say, "There could be no such composition time out of mind, hops not being known in *England* till queen *Elizabeth's* time, for then they were first brought from *Holland*; though beer is mentioned in a statute of *H. 4.*"

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This account of the introduction of hops is certainly inaccurate, for we find that hops were known before 1562; for they had attracted the notice and encouragement of the legislature at that time, as appears by 5 & 6 *Ed. 6. c. 5.*

We have then the authority of Lord *Coke*, that the use of hops in beer is of modern introduction; and supported by the authority of this passage in 4 *Inst.*, and of these very inaccurate reports of the case of *Crouch v. Ridsen*, the modern authorities uniformly consider it as settled, that hops were first cultivated within time of legal memory, and that they cannot be the subject of immemorial custom. Yet I cannot but observe, that as the hop is probably indigenous, and as (if reporters are correct) the court were certainly not aware how long the hop had been an article of cultivation, the judicial notice which they took of its modern introduction seems to have a slight foundation. To ascertain satisfactorily the law as to tithing hops, it may not be amiss to state, in historical order, the several cases which are reported on this subject. The earliest case we have in our books, respecting hops, is cited in *Hutton* 78. (a); it

Supra 512.

was 3 *Jac. 1.*, between *Potman* and another. The question was as to the nature of the tithe, and adjudged to be a great tithe; but as for hops in gardens and orchards, they were adjudged to the vicar as *minutæ decimæ*. In *Hil. 14 Jac. 1. B.R.* (1616) it was said by *Hitcham* Serjeant, and agreed by *Montague*, (who was then Chief Justice,) that a man may set forth a tenth part of hops for tithes *before they are dried*. 1 *R. Abr.* 644. *Y. Pl. 3.*, between *Barham* and *Goose*. From this *dictum* of Serjeant *Hitcham*, as to setting forth the tithe before they are dried, it seems pretty clear that the setting forth the tithe by measure was practised in some countries at that time, though we know not how generally. But on the other hand, if the law of tithing hops by the tenth measure, after picking, was the general rule from the time they were first cultivated, it seems difficult to say by what analogy the tithe of the mere flower of the hops was ever considered as a great tithe. Hops were an article of general cultivation before the reign of *Car. 1.*; for in the case of *Uvedale v. Tyndale*, *Hutton* 77. 1 *Car. 1.*, the court say, "In some countries a great part of the land within the parish is sown with hemp or hops." In 1629, 4 *Car. 1. Trin. B.C.* *Alfrey v. Mills*, the court held, that where there was a *modus* for a garden, hops growing in a garden were within the *modus*,

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Supra 880.

(a) In *Uvedale v. Tyndale*, noticed *supra* 880.

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provided that they did not grow in any addition to the garden. — From these cases we may safely infer, that hops were an article of general cultivation as early as 4 Car. 1., and that there had been several litigations as to the nature of the tithe, whether great or small, and as to the claim of a *modus decimandi*. In the case of *Ledgar v. Langley* (1666), *Pasch.* 18 Car. 2. B.R., on a question as to the mode of setting forth tithe of corn, the court say, (according to the report, 2 Keble 36.) that the custom in *England* is to set forth in sheaves; but each country hath several ways, as of hops, which, by *Keeling* (then Ch. Justice of B.R.), is a small tithe, and payable by the pole. What Ld. Ch. Justice *Keeling* is here reported to have said, as to the nature of the tithe, is now considered as law. For, notwithstanding the case cited in *Hutton* 78., hops are now held to be a small tithe. According to the report of the same case, 1 Sid. 2. & 3., *Twisden* J. said, that it has been questioned, and is not now known, how the tithe of hops shall be set out, *scil.* by the tenth pole or by measure. And in the case of *Crouch v. Ridsen*, *Hil.* 21 & 22 Car. 2. B.R. (1670), 1 Sid. 443., the reporter adds, note *per Twisden* J. (who lived in *Kent.*) — It is a question this day how hops shall be tithed, whether by the hill, or by the pole, or by the bushel. I have been the more particular in deducing the cases thus in chronological order, because I think it must appear clearly from them, that from the first cultivation of hops, which was before A.D. 1551, till after 1670, a period of above 120 years, though hops had for a long course of time been an article of general cultivation, no certain mode of setting forth the tithe of them had been established; consequently, we may presume that different modes prevailed in different parishes, and perhaps in different parts of the same parish, and some particular modes might have prevailed in particular places, for a very long course of time, even from the first cultivation of the hop.

The tithe owner received his tenth, and had a right to his tithe in kind: no *modus decimandi* was allowed; but as to the *modus exponendi*, or mode of setting it forth, various practices prevailed. This distinction between the *modus decimandi* and the *modus exponendi* was taken by *Lindley*, who was counsel against the prohibition in the case of *Ledgar v. Langley*, and seems to me to be a sound distinction.

Supra 279.

In *Hob.* 107., *Wilson v. The Bishop of Carlisle*, 13 Jac., on a question, whether a custom was good to tithe wool truly without view of the parson, Lord *Hobart* holds it bad, and says, "The law provides that you have your right, and therefore that your means be such as is likely to produce it." Here is a distinction between the right and the means whereby that right may be obtained; *i.e.* between the right to the tenth, and the means whereby that tenth

may be ascertained and set forth. And the doctrine laid down by the court in the case of *Hide v. Ellis* * is to the same effect, that tithe naturally is but the tenth of the revenue of my ground, not of my labour and industry, where it may be divided. If, therefore, a mode could be devised, by which the tithe owner may receive the tenth of the produce of the hop grounds, and the same may be conveniently set forth, I feel no absolute necessity for requiring the farmer to set it forth by measure. The *modus exponendi* may vary, provided the tenth is received in kind.

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• Supra
432.

The law of tithing hops thus being unsettled till so late a period, let us see when the law was settled, and what law was settled on the subject.

From the *dictum* of *Hitcham* Serjeant, 1616, till the case of *Chitty v. Reeve*, 1687, I am not aware of any decision, or even of any *dictum* in our books, which ascertains or even suggests how the manner of setting forth this tithe is settled; that case states how the law was settled, and is cited by Mr. *Ward* in the case of *Bake v. Sprackling*, *Scac.* 1717 (*Bunbury*, 20.), as having settled the law on the subject, *viz.* that tithe of hops are not to be paid till after they are picked, and before they are dried, every 10th measure. *Bunbury* in a note says, that the tithing of hops was settled in the case of *Bliss v. Chandler*, 1720; but in this he is inaccurate; for in reading the decree in *Chitty v. Reeve*, no one can doubt that the general law was there ascertained, and that subsequent cases have only served to confirm the law there settled, without impeaching any thing there laid down, nor has that case ever been impeached till the present difficulty was started. It seems, therefore, of great importance to the decision of the present question to examine accurately what was the law laid down by the court of Exchequer in that case. The court were fully apprized of the terms of this custom, of the mischiefs of cutting the binds, and not tithing by measure after picking, and that by the law of the land tithe hops ought to be paid in kind, *viz.* the tenth part of the whole after picking; yet the court declare in favour of the usage, and make a decree to the following effect: "It fully appearing to the court, that the custom, usage, or practice of paying tithe hops in the parish of *Farnham* for above sixty years past, hath been that the impropiator hath had the tenth row when equal, else the tenth hill; that the same hath been left standing with the hop binds uncut; that the impropiator hath always had convenient time to come and cut the binds, and to pick the hops on the ground: the court were of opinion, and declared the said custom, usage, and practice, reasonable and fitting to be observed; and the court declared, that in case there was not any such usage, the tithe of hops ought to be picked in kind, *viz.* the tenth part of the whole after picking." Thus, in

Infra 1538.

[1541]
Supra 618.

Supra 625.

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the very first case in which we have any account that the law of tithing hops is settled, we have also an account of a usage allowed to stand against it. Words cannot express more plainly, that, according to the opinion of the Exchequer, a usage or practice, if convenient and fitting to be observed, ought to be established against the common law right, which was now declared to be by the tenth of the whole after picking. It was objected in the argument, that this usage was set up by the executor of a lessee for a short term, who could not bind the right of his landlord; but let the usage be set up by whom it might, it was disputed by the occupier; and if the court had thought that no usage could stand against the general law of tithing hops, as it was then held to have been settled, they were bound to have declared against the usage.

[1542] When the law was settled we do not precisely know; but this case declared that it was settled, and how it was settled. With respect to the *modus exponendi* thus established, I cannot but make this observation, that it seems to have been adopted on a principle of convenience only, for it certainly is not a regular legitimate mode of tithing; it gives the tithe-owner the flower of the hop only, and it withholds from him the stalk, though, according to the course of husbandry as to hops, the bind is first severed, and then the hop is picked. By a sort of compromise, for convenience sake, it takes from him the stalk to which he has a sort of legitimate right from the moment of severance, and gives him the benefit of the planter's labour and expence in picking; to which, according to the principle laid down in *Hob. 250.*, he has no right at all.

I am aware, that since the hop has been decided to be a small tithe, attempts have been made to put it by analogy on the same footing as the tithe of fruit. The bind is likened to the branch of a fruit tree; and it is said that the parson is only entitled to the fruit; and that as the farmer may not pluck off a bough and give it to the parson, and bid him gather the fruit, so neither ought the farmer to cut the bind and leave the parson to pluck the hop. This may be similitude, for there are some faint traces of resemblance, but it certainly is not analogy; because it is defective as to the main circumstance, the common course of husbandry. The constant course of husbandry is to sever the bind; but by no course of husbandry is it usual to cut the branches off the fruit trees. Should a farmer cut his binds and refuse to pick his hops, I think it probable that our courts of law would hold this to be so far a severance as to entitle the tithe-owner to something, if he thought it worth his while to claim it; or should it happen that by any course of husbandry the binds were severed on one day, and not picked till the next, and should the tithe-owner die in the intermediate time, I think it probable our courts would consider this as a severance, and give the

tithe to the executor; because *the severance is according to the course of husbandry*. In short, I consider this *modus exponendi* as peculiar, as not reconcileable by analogy to any prior mode of setting forth, as founded solely on the peculiar nature of the subject-matter; and as settled on a principle of convenience only; and if the court of Exchequer, proceeding upon this principle, has also held, that where a convenient usage has long prevailed in a particular parish, it shall be established against the general principle of convenience where no usage is set up, I do not feel myself warranted or disposed to say that the court has done wrong. I consider the court of Exchequer [1543] as proceeding with great and laudable caution in settling this point of law, aware of the great length of time during which the law had been unsettled, and aware of the possibility that particular practices might have prevailed in particular parishes, which were reasonable and fitting to be observed, but that where there is no such usage the general rule must prevail. Since the case of *Chitty v. Reeve*, this point has never come directly in question till the present case; several cases have been litigated as to the tithe of hops, in none of which the doctrine laid down in *Chitty v. Reeve* has been denied, but in some of which it has been affirmed. In the two cases of *Gee v. Pearch*, 1698, 1704, 1 *Wood*. 386. 439., the court declare, that hops ought to be picked and gathered from the bind before they are tithed: this had been already settled in the case of *Chitty v. Reeve*, and was no new doctrine; the custom set up in the first of these cases, 1698, was, that 10s. an acre should be paid for the tithe of hops: such a custom was void, according to the principle laid down in *Crouch v. Ridsen*, 1 *Sid*. 443.; but this custom respected a *modus* in discharge of tithe, not the manner of setting it forth.

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Supra 563.
681.

The case of *Bliss v. Chandler*, 1728, 2 *Wood*. 148., respected the manner of setting forth tithe of hops, but the defendant set up no custom. He had paid tithe of early hops by the bushel after they were picked, and the remainder, by stripping the binds from every tenth pole or hill, and leaving them on the ground for the plaintiff to pick. The court say "tithe must be paid by every tenth bushel of the whole after they are picked." Here the defendant had set forth his tithe in two different ways, but alleged no custom in support of either; the court, therefore, did not decide any point as to custom, but declared the general law. The next case that is reported on this subject is the case of *Sneyd v. Urwin*, January 1740, 2 *Wood*. 403. The rector of *Hanningham Sible* in *Essex* claimed tithe of hop by receiving on the hop grounds, where the same arise, the tenth measure or weight after they are plucked from the stalk, and before they are dried and packed. The defendant set up an *ancient usage*, whereby the rectors are obliged to accept their tithe-

Supra 625.

Supra 774.

1800. hops by the tenth pole or hill, after the vines are severed from the ground and stripped off the poles, and that the said rectors were, and the plaintiff was, obliged to pick all the tithe-hops. Here was an ancient usage set up less favourable to the rector than the usage set up in the case at bar, because it was to sever the binds from the ground, and strip them off the poles; yet the court did not pronounce it *a priori*, and say it was technically impossible that any usage could be supported against the established right. The court was very deliberate in its proceedings: it heard the counsel; it read the process; it read the several decrees in *Chitty v. Reeve*, in the two cases of *Gee v. Pearch*, and in the case of *Bliss v. Chandler*; and with this full information before them, it directed an issue to be tried by a special jury, whether, by the usage in the parish of *Hanningham Sible*, hops are to be tithed before they are picked from the stalk?

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The case has great weight with me: the court had the case of *Chitty v. Reeve* before them, as well as the other cases: they were well apprized of the general law, and yet they directed this issue. Must not a plain man infer from hence, that according to the opinion of that court a usage to tithe hops before they are picked from the stalk might, under some circumstances, be supported against the general rule? It is observable, that the court did not direct an issue on the particular custom set up by the defendant, but a mere general issue on usage at large. Had they not thought that, according to the case of *Chitty v. Reeve*, usage might stand against the general rule, they surely would not have directed such an issue. And if any usage whatever could be supported against the law then generally established, then this case is an additional authority to shew that the technical objection made to the usage now set up ought not to prevail. On the trial of this issue, the jury found a verdict *against the usage*. In the year 1752 the rector filed his bill against the son of the former defendant *Unwin*; the defendant answered to the same effect, as to the custom of tithing hops, as his father had done in the former cause; the court declared that the method of tithing hops insisted on by the defendant is not the legal method of tithing hops, but that they ought to be picked and gathered from the binds or stalk before they are tithable, 2 *Wood* 478. There can be no doubt that this decree was right: the question as to usage had been tried, and the jury had found against it; and there being no usage, the method set up by the defendant was not the legal method.

The next and last case in print on this subject is the case of *Walton v. Tyers*, in *Scac. February* 1753, and ultimately decided in *Dom. Proc.*

This case is relied on as having finally settled the point as to the

mode of tithing hops. I do not understand the case to have settled any point which was not well known before. From the case of **Chitty v. Reeve*, the decisions had been uniform, that the tithe of hops is to be set out after they are picked and before they are dried, unless in parishes where there had been a usage to the contrary. On the point of usage there were two cases which seemed very strongly to allow its validity; and on this point the case of *Walton v. Tyers* decides nothing. According to the account of this case in 2 *Wood* 484., the defendant in his answer disputed the general rule of law, and insisted that the tithe-hops ought not by law to be set out after they are picked from the bind or stem; and he denied that there was any custom in either of the parishes for setting out the tithe of hops; so that the court decides nothing on the question of custom. It seems as if those who advised the parties in their pleadings thought that custom or usage might be material in the case.

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*[1545]

On these authorities, and for these reasons, I am of opinion, that, according to the law established for tithing hops, the general rule that hops are to be tithed by measure after they are picked, and before they are dried, has not been established so peremptorily and strictly as to destroy or to disturb such reasonable and convenient usages as have prevailed uninterruptedly, and for a long course of time in particular places, but has been established with due caution and circumspection, and subject to such usages.

My second proposition is, that the law, settled as above stated, with a restriction as to local usages, is not contrary to the principle of tithe law. And so far is it from being contrary to these principles, that it is in strict analogy with them. The manner of setting out the tithe of every tithable article has been for the most part long known and settled; yet there are many articles which local usage regulates the mode of setting forth.

In *Hob.* 250., *Hide v. Ellis*, 16 *Jac.*, it is said, "In divers places they set out the tenth acre of wood standing; so of grass."

This shews at least the opinion of the court, that the *modus exponendi* may be regulated by the custom of the place. 2 *Keble*, 3. *P.* 18 *Car.* 2. *Ledgar v. Elcocke*, the court are reported to have said, on a question of tithe-corn, "The custom of *England* is to set forth in sheaves; but each country has several ways, as of hops." In *Holbeech v. Whadcock*, *P.* 13 *Car.* 2. *Scac. Hardr.* 184., it is said, agistment tithes for barren cattle are due *de communi jure* according to the value of the land after the rate of 2s. in the pound; for that they cannot be otherwise valued or accounted for, because the profits of the land for which they are paid are perceived by the mouths of beasts; but by custom or prescription they may be paid in other manner, as by the acre, or for all manner of cattle barren,

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and for the plough and pail. So in *Hicks v. Woodeson, R. W. & M. B. R.*, as reported in *Skinner*, 560.*, *Holt* Chief Justice says, "Tithes for barren cattle are due *de communi jure*, and 2s. in the pound is the usual tithe of common right; but there are divers customary manners of tithing for them."

Supra 158.

In addition to these authorities the law as to tithing milk is a complete proof that the custom of the place may regulate the mode of setting forth tithe. The common law right has been finally settled by very modern cases, but it has been settled with a due regard to all the local customs which have prevailed in different parishes. The case of *Stebbs v. Goodluck, Moor* 913. 1 *Leon.* 99. *P.* 38 *Eliz. B. R.*, appears to me very material to this point. The custom there set up was, that the parson shall have for his tithe the tenth land sown with any manner of corn, and he shall begin his reckoning always at the first land which is next the church. The parson shewed that the defendant, by fraud and covin, sowed every tenth land which belonged to the parson very ill, and with small quantity of corn, and did not dung or manure it as he did the other nine parts, by reason whereof the other nine yielded each eight cocks, and the tenth yielded but three cocks. The parson libelled in the spiritual court, and confessed the custom, but for abusing the custom prayed the tithe in kind; the defendant prayed a prohibition, and the parson afterward a consultation. And the opinion of *Wray* Ch. J. was, that the custom was against common sense, and so void; but if it be a good custom, then the parson shall have the action on the case. This is the report in 1 *Leon.* The case is also reported in *Moor* 913., who says, that a prohibition was awarded, notwithstanding the covin; for the fraud may be remedied in an action on the case at common law. Whether a consultation was afterwards granted does not appear from either report; but it is said in argument by counsel, 2 *P. Wms.* 569. (*Chapman v. Monson, Hil.* 1729), on what authority I know not, that a consultation was granted on *Wray* Chief Justice's opinion. This case furnishes observations very applicable to the case at bar.

Supra 679.

1st. *Wray* Ch. J. declared his opinion immediately on the argument, that the custom, though confessed and set up, as in the case of *Chitty v. Reeve*, by the parson, was against reason, and so void: he did not (as the court of Exchequer are supposed to have done in the case of *Chitty v. Reeve*) suffer a custom to be set up under the sanction of the court, which he thought to be void; but he declared his opinion directly, and I am disposed to think with equal [1547] favour of the court of Exchequer in 1687, that had they thought no usage could prevail against the general right, they would have declared so, notwithstanding the usage was confessed and set up by the impropiator.

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2d. Supposing *Wray* Chief Justice's opinion to have been the opinion of the whole court, it does not affirm that a custom to tithe the tenth part of corn growing upon the land is bad, but it affirms this, and this only, that a custom to tithe the tenth land of corn, beginning at one certain land, is void, because it is open to the fraud of manuring and sowing the parson's land worse than the other; and according to this distinction the law is laid down in *Watson's Clergyman's Laws*, c. 49. page 549. — "If the custom of the place be to measure forth to the parson the tenth part of the corn standing, this manner of tithing is, I conceive, to be observed, and the parson must sit down by it." Mr. *Bohun*, in his *Law of Tithes*, chap. 2., says the same; and adds, It seems to me such a custom or prescription may have a reasonable foundation on this supposal, that the field where these lands or ridges lay was originally a common waste field belonging to the township; and that, on agreement of the parishioners to turn it into arable, they consented to allot the tenth land or ridge by them sown to the parson, but he to reap it. If there be any weight in this observation by Mr. *Bohun*, it applies very strongly to the case now before the house; for, *pari ratione*, it might be agreed in this parish of *Farnham*, that the parishioners should turn their lands into hop grounds, and consent to allot the tenth row or hill to the parson, and he to sever and pick the hops, and to have convenient time for this purpose.

It seems not settled at this day what shall be sufficient evidence to warrant a jury to find such an agreement; but, if a jury may presume a grant or agreement from usage only, then they may presume that in this parish an agreement may have been made before the restraining statute of 13 *Eliz.* c. 10., and by consent of the proper parties, namely, by the parson, patron, and ordinary. For we know that hops were an article of husbandry before the 5th and 6th of *Ed.* 6. (thirty-eight years before); and *Hob.* 297. says, that a grant of a parson, patron, and ordinary, is good without any recompence.

There is a report 2 *Leon.* 70. of an anonymous case, *Hil.* 24 *Eliz.* B. C., which certainly countenances this doctrine of tithing by the tenth land. — "By the civil law the parson ought to have his tithe by the tenth ridge; and in a great field there was corn upon the arable and grass upon the head-lands; and in a suit for tithe-hay and raking of the corn, defendant did prescribe to pay the tenth shock of corn for all the corn, hay, and raking of corn; and in the end all the justices agreed, that by the civil law the tenth ridge is due for tithe-corn; therefore, for the reaping, binding, and shocking, it is a reasonable prescription, that the party shall have the hay on the head-lands in recompence of the said other things, and the hay upon the head-lands is but of little value." Upon the

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whole, this case of *Stebbs and Goodluck*, sifted and commented upon as it has been by our text writers, is, to my understanding, a very considerable authority to prove, not only that local custom may regulate the mode of setting forth the tithe, but also that, according to professional tradition, tithe may be set forth while standing, and before it is severed; though it is true, as was observed by Mr. Attorney-General, that there is no adjudged case in which it is declared that tithe may or may not be so set forth. The answer given to all these cases is, that they respect articles which have been used time out of memory, and which therefore may be the subject of a legal custom. This answer is merely technical, for we all know that in point of fact the evidence of usage seldom goes back so far as two centuries; but, if it goes back for a considerable length of time, and the article which it respects has been of immemorial cultivation, a presumption attaches that the usage has been immemorial. In the case of hops, no such presumption can attach, because the hop is of modern cultivation; but it seems to me, that courts of law are at liberty to decide by analogy in this, as in other cases which arise on new subjects; and if they observe, that local usage has been respected as to the mode of setting forth those tithes which may be the subject of custom, they may also respect it when they declare a new system of law on a subject introduced within time of legal memory. This, I think, our predecessors have done on the subject of hops: they have said that local usage, if convenient and of long continuance, shall be respected; and that when there has been no such usage, the tithe shall be set out by the measure after picking.

[1549] It appears to me to be fallacious to state the present question to be, whether modern usage can be set up against the established law of *England*: if that were the question, I should answer without hesitation that it could not; but I consider the question at present to be, whether the courts of law have not, when they first settled the general practice as to tithing hops, settled it with a due deference to particular local usages, and whether they might legally do so: they were aware that the usage, though not immemorial, might be coeval with the cultivation of the article: that in particular places fit and convenient usages might have prevailed: that the general rule declared by them was anomalous, illegitimate, and supportable upon principle of convenience only; and, therefore, they would not set it up rigorously and strictly to disturb the peace of parishes, and to destroy all established usages; but they laid down their rule subject to such a reasonable usage as had obtained in particular places.

Now, if convenient usage is first established, and the law is settled afterwards upon a principle of convenience, why may not the courts settle the law subject to such usage? Are we to be told

that the law is drawn from the eternal and immutable principles of reason and justice; and that, though it was settled as to some particular point only yesterday, it must necessarily have relation back to the first constitution of things, and destroy every usage to the contrary? This doctrine, rigidly pursued, would destroy all local custom; for the custom being in derogation of the law, ought then to have been abolished when the law was settled; but the courts have declared, that both being beyond time of memory, custom, if reasonable, may stand against the common law, though it is in derogation of those immutable principles on which the common law is founded.

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I see no reason why our courts may not follow a similar rule by analogy; and when they know, or have reason to believe, that convenient local usages have prevailed for above a century before the law was settled, why they may not lay down this rule with a due regard to the preservation of those usages. If they have done so, (and I think they have in the present instance,) I incline to support the decisions; I do not hold myself bound to say, that my predecessors were in an error in 1687 and 1740, and that, though morally right, they were technically wrong, or to set parishes on a new course of tithing, and, for aught I know, on a new course of husbandry as to picking their hops, when I have evidence before me that they have proceeded in a particular course, peaceably and quietly, for near 200 years, under the sanction of a decree of the court of Exchequer. The rule of *stare decisis* is as justly applicable to private parties as it is to general principles, where the decision can be reasonably ascertained and supported; and on the present question I find no principle and no decision, ancient or modern, which calls on me to declare that the decrees of 1687 and 1740 were against law.

My third proposition is, that the usage set up in this case may [1850] be supported without violating any legal principle.

If the opinion is well founded, that the general law of setting forth the tithe of hops has been settled, with exception as to convenient and established local usages, and that it is no violation of legal principles to have settled it so, the only doubt on this proposition will be, whether there is any thing illegal in the usage here especially set up, where the subject matter is capable of custom; and where usage can be ascertained, courts of law have been even astute to support it.

The case of *Scory v. Baber*, P. 34 Eliz. Cro. Eliz. 276., was a prohibition against the proprietor of the church of *South Kirkley*, who sued for tithes of hay. It was surmised, that time out of mind the owners of these lands had found straw for the body of the church, in discharge of all tithes of hay. Coke moved, that this

Supra 163.

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is no discharge, for the parson was not chargeable with it, nor had any benefit by it, and of that opinion was the whole court; but, if he had alleged that he gave the straw to the parson, and he bestowed it in the body of the church, or that the *parson had a seat in the body of the church*, it had been otherwise. In short, any compensation, however small, may be sufficient to support a discharge from payment of tithe in kind; and the smaller the compensation, (if it is pecuniary,) the greater is the probability of its antiquity. It was said in the argument, that there should be some mutuality between the parties, some benefit to the one, and some charge to the other; the compensation need not be equal, but something should be given, however small: this rule holds as to a *modus* in discharge of tithes in kind, but I do not find that it holds as to the *modus exponendi*.

Tithes may, according to the authorities and cases above referred to, be set forth according to the custom of the country, without a particular compensation for not setting them out according to the general rule of law. The usage set up in the present case is stated at length in the bill of exceptions. Divers objections have been suggested to it. 1st, That it gives no recompence even in the binds. I answer, 1st, That no recompence is necessary in a usage merely as to the setting forth of tithe.

2d, That as the custom is here stated, I think the binds left for the parson to cut do pass to him; the farmer does not state that they are to be left for him; I think he may choose whether he will carry them away. And as to the binds being a recompence, it is well known that experiments have been lately made to turn them [1551] into a pulp which may make a paper, though they have not yet succeeded.

The second objection is, that there is no severance. I answer, that there is a severance by the farmer of his share, so as to ascertain when the tithe is due: the severance of the tithe in kind is merely for the benefit of the tithe-owner; and if he chooses to renounce this benefit for his own convenience, he may lawfully do it.

The third objection is, that it will not give a complete tithe; for suppose there should be only nine hills, the parson would be entitled to nothing.

I answer, that I do not find the usage so stated. I should rather suppose, that if there were only nine hills the usage would not attach: but the supposition of only nine hills is rather a matter of fancy than a case likely to happen; and perhaps it may be fair to answer, that such a small circumstance as this is beneath the regard of the law in a question of parochial usage. *De minimis non curat lex.*

The fourth objection is, that it is open to fraud; that the farmer may manure some hills better than others; that in setting out his tithe, he may begin to reckon from some particular hill, so as to throw all the unproductive hills into the parson's tithe.

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I answer, first, that this is not like the case of the custom condemned by *Wray* Ch. J., when the farmer was necessarily to begin at a particular ground, and might, consequently, neglect to manure every tenth ground, and know for a certainty that it would be the lot of the tithe-owner: here, the farmer has no customary right to begin at a particular hill; he is to begin, as in a corn or hay-field, at such hill, or sheaf, or haycock, as may enable him to set forth the tithe fairly and equally; he must set it forth openly, so that it may be viewed, and objected to by the tithe-owner or his agent; and if it be not fairly set forth, the tithe-owner has various remedies to enforce his right. But further, the supposition that the farmer can manure and prepare his hop-ground in such a manner as to enable him to count the tenth hill or row so unfairly as to make all the blasted, or blighted, or unproductive parcels fall to the parson's share, is much too refined, and is directly contrary to the facts stated in the bill of exceptions: "Many hills may be weak, and many die, and it is impossible to know which." The bill of exceptions also states, that the tithe of hops may be fairly set out by the tenth hill, and that such setting out is the most convenient mode, and least liable to fraud. There is also the opinion of the court of Exchequer in 1687, that the custom, usage, and practice [1552] is reasonable, and fitting to be observed. Under these circumstances, I do not feel myself warranted to pronounce that this usage, which had prevailed, and in which all parties had acquiesced, for above sixty years before 1687, and which has surely influenced all parties in the compositions they have made for above a century past, is in itself illegal, and could not be supported if it respected a subject of immemorial existence. I do not presume to impeach the policy or wisdom of the general law laid down as to tithing hops. It is, probably, the most politic and convenient that could be adopted; and the present litigation shews, that (in the opinion of the tithe-owner of this parish at least) it is more profitable for the church than the usage which the parishioners of *Farnham* now set up. But I think it is anomalous, and founded on the principle of convenience and policy only; and I think, too, that it is not wholly void of inconvenience, nor likely to be unproductive of disputes where there is no composition. For the farmer is not bound to provide measures or vessels to hold the tithe after it is ascertained; consequently, the tithe-owner must have agents attending in every ground, and in various parts of extensive grounds, while the hops are picking, who must be ready to receive the tithe immedi-

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ately as it is set forth. Such rights on each side may give rise to great disputes where the tithes are taken in kind, and the parties cannot agree on a composition. The usage here set up may have inconveniencies also; but they are not of such a nature as to satisfy me that the court of Exchequer did wrong, when, in 1687, they declared the usage to be reasonable, and fitting to be observed. The conveniencies and inconveniencies of the usage may be thus stated: The loss to the tithe-owner is, the benefit and expence of picking the tithe. On the other hand, he takes his own reasonable time to pick; he saves the expence and difficulty of procuring a number of agents to attend in various places; he picks and sorts as he pleases; he has the stalks, if ever they should prove valuable.

The farmer, too, has some disadvantage. His ground may be incumbered; his hop-poles are used and exposed for a reasonable time beyond his own harvest.

[1559] Upon the whole, I am of opinion, that the law of tithing hops has been settled, not generally, but with an exception as to reasonable and ancient usage respecting the mode of setting it forth. That the courts might so settle the law, and allow such exception, without violating any sound principle of the law of *England*, and that this usage set up by the plaintiff in error in the bill of exceptions (if the jury had been of opinion that the facts there stated were sufficiently proved) is not contrary to any principle of tithe law.

Some apology may not be improper for having occasioned so much trouble to the House and Judges, for thus differing in opinion from those whose judgement I feel myself both disposed and bound to respect. The best apology I can make is to say, that as it is my opinion, I am bound by my oath to avow it, and by my duty to the public to state the grounds on which I have formed it; and it is a great satisfaction to me to know, that if I am in an error, this House will take care that my error shall work no injury to the parties, nor to the established law of the country.

The course of argument pursued by the learned Judges, who thought the direction right, was to the following effect:

The consideration of this question resolves itself into three heads; 1st, what is the general rule of law with respect to the setting out the tithe of hops, independently on particular usage or practice in particular places? If that rule should be found essentially to vary from the course which has been pursued in the parish of *Farnham*, and to which the plaintiff has conformed; then, 2dly, whether the usage stated in the bill of exceptions, however convenient and applicable to any modern improved methods of cultivating and preparing the hop for market, can overturn the general rule, or be supported upon any legal principles; and, 3dly, whether suff-

cient matter was given in evidence whereon to ground a sound presumption of a real composition having taken place with respect to this article of annual increase? That this article became a subject of cultivation long posterior to the time of legal memory, is a fact noticed in a variety of cases agitated more than a century ago. It seems true, indeed, that the courts of justice were not called upon to declare the particular mode in which hops were tithable, until a considerable time after their introduction into this country; though, when the point did arise, there appears to have been little difficulty in deciding it. All tithable matters, when newly introduced, are classed among others to which they bear an obvious resemblance, and are accordingly deemed a great or a small tithe, and are required to be severed and set out in a similar manner with those articles which they resemble. Such has been the case with wood, saffron, tobacco, and other such tithable matters; such would have been the case with madder, had not the legislature established a temporary composition, which expired in 1786; such [1554] has also been the case with all artificial grasses. The right of the parson to his tithes in kind accrues on the act of severance: his right to take the tithe accrues when the tithable matter, after severance, is in the earliest stage of the course of husbandry applicable to it, in which the tenth part may be visibly distinguished from the other nine. What shall be deemed a severance must depend upon the nature of the matter to be severed. But no other mode of severance in the case of tithable matters of annual increase has been judicially recognized, except that of severance from the soil, and severance from the parent stem. The same principle that requires fruit and seed to be set out after they are gathered or collected by measure or weight, must require hops to be tithed in the same manner after being picked or gathered from the plant. The flower of the hop is the sole object of the cultivation of that plant; and it not only is, but necessarily must, to preserve its quality and value, be picked and gathered upon the spot. It seems difficult to distinguish the case of hops from peas plucked by the hand for the use of man, as the phrase is, from the bind of the plant; or from beach-mast and acorns pulled from the trees. Hops are in truth the fruit of the plant as much as the pod of peas. Upon principle, therefore, the mode of severing and setting out the tithe of hops contended for by the plaintiff in error is not that which the law requires. Although there was a time when it was doubtful what the common law principle of severing and setting out this tithe was, the point is now settled even in the last resort. The first case is in 1 *Roll. Abr.* 644. 14 *Jac.* 1., where it is said "a man may set out his tithe of hops before they are dried."

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or by any thing to be drawn from the nature of the case, it seems completely settled, that the severance of the tithe of hops must be by separating the fruit from the stem.

Seeing, then, what is the general rule as to severing the hops, and setting out the tithe thereof, we may proceed to inquire whether any such usage as that which has been set up by the plaintiff in error can be supported, consistently with the rule of law. The usage stated in the bill of exceptions amounts to this, that the occupier shall, at his discretion, leave for the rector the tenth part of the hops not severed, as we have seen that the common law principle requires, but in a stage of the husbandry of this article [1556] short of that in which he is entitled by law to receive it, and that without compensation. This is precisely the same thing in principle as if it were contended that the rector by custom should receive a less quantity in that stage of husbandry, when it is by law to be set out, than he is entitled to; for abridging the quantity of the tithe, and calling upon the rector to incur expence when he is not by law obliged so to do, come to the same end, since both equally reduce his profit. The question then is, whether the usage contended for be good and available in law. Now there are three distinct things besides the rules and principles of the common law that controul the right of tithes, viz. custom, *modus*, and real composition. These three rest on different foundations, the confounding of which has introduced much of the perplexity and difficulty which has arisen in this cause. Custom, in respect of predial tithes, chiefly regards the manner of setting them out. It must be immemorial; it requires no equivalent; it is to be presumed coeval with the original payment of tithes, or endowment of the parish church, provided it be not subject to fraud; for it never can be presumed that the lord of the manor, at the time of endowing the parish, meant to stipulate for such a mode of setting out the tithes as would defeat his own endowment. Hence came the different modes of tithing the same articles in different parishes. In some places the modes of husbandry, in others the fervor and zeal of Christians in the early ages, gave an advantage to the parson. When the lords of manors consecrated their tithes to any church, as they might have done before the second counsel of *Lateran*, probably they expressed in the consecration in what manner the tithe should be paid. *Cujus est dare, ejus est disponere*. See *Selden's History of Tithes*. The payment of tithes was at first voluntary and of imperfect obligation. Afterwards, indeed, it was enforced by Papal bulls, and by decrees of councils; but the canonists in all ages admitted, that the custom of tithing was to be observed in every parish. *Lindwood, de Decimis*, p. 196. *Modus* and real composition differ from each other in nothing more than in

1800. their origin. *Modus* must have existed from time immemorial; composition real must have been made before the disabling statute of the 13 *Eliz.* But both *modus* and real composition must be subsequent to the original endowment of the church, inasmuch as they controul it, and are founded on the consent of the parson, patron, and ordinary. Now the usage of tithing hops, insisted on by the

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[1557.] plaintiff in error, cannot be referred either to a custom or to a *modus*, because the cultivation of hops was introduced within the time of legal memory. Whether the plant be indigenous or not, we are informed by many cases which occurred at a great distance of time from the present day, that its cultivation for use is modern; and indeed the evidence in the present case states, that in the parish of *Farnham*, and elsewhere in the kingdom, hops are, “with reference to time of legal memory, modern, and within time of memory;” and it was almost conceded at the bar, that as a custom which was immemorial, reasonable, and certain, the usage contended for could not be supported, although it appears to have obtained a considerable time prior to the last 100 years, during which the parish has been under composition. In *Crouch v. Ridsen*, 1 *Sid.* 443., the court refused to grant a prohibition upon the suggestion of a *modus* for hops, declaring that they would take judicial notice that hops were not of sufficient antiquity to become the particular subject of a *modus*, though hops, as well as other matters of novel introduction, might be included in a *modus* for small tithes in general. This case arose a considerable time before that of *Chitty v. Reeves*, which was decided in 1687; and after the case of *Chitty v. Reeves*, the same point was again determined in 1698; for in the case of *Gee v. Pearch*, the defendant having set up a *modus* of 10s. an acre for hops, the court declared the custom void in law; and according to a short report of the same case from a manuscript of Lord Chief Baron *Dodd*, in *Rayn.* 87., the second resolution is, “that no *modus* can be for hops, being a late thing.” So Lord

Supra 749. Ch. B. *Comyns*, in his judgement in *Wallis v. Payne*, *Com.* 638., considers it as settled, that hemp, thyme, saffron, hops, and tobacco, are new things, and, as such, are to be ranked with matters of a like nature as small tithes. But it was contended, that the mode of setting out the tithes of a matter newly introduced, with reference to the time of legal memory, and which mode was possibly coeval with the introduction itself, might be good, as being reasonable, and that this was actually so by usage in other cases. To this it may be answered, that a custom of tithing, like every other custom, must be conformable to what is required by the common law; and that reasonableness or fitness will not alone dispense with other *expedients* which necessarily enter into the definition of a custom. It would be repugnant to every principle of law, to hold that an obligation,

created by the general law of the land, could be avoided within particular limits by the immediate effect of a contrary practice of sixty *or seventy years in that district; or, according to the argument at the bar, that there shall be a rule of law which is only to take place when there has been no practice to the contrary. Immemorial reasonable usage may, indeed, locally supersede the common law, and introduce a different rule; but the common law cannot be different at *Farnham* from what it is in *Kent* or in *Essex*, or in other places. It must be the same in all places, otherwise there is no rule of the common law at all.

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 • [1558]

In support of the usage stated in the bill of exceptions, the case of *Chitty v. Reeves* was cited, the proceedings and decree in which cause are to be found in 1 *Wood*. 251. This case deserves particular examination. It arose in this very parish of *Farnham*. The opinion of the court was given upon nearly the same statement of the practice of sixty years before the statute of *Jac. 2.* that is to be found in this bill of exceptions; and if that opinion were well-founded, in point of law it would dispose of the question in the plaintiff's favour. A bill was filed by the administratrix of the lessee of the tithes for an account of the tithe of hops, suggesting, that the custom in *Farnham* was to set them out in the manner contended for by the present plaintiff. The defendant, the occupier, admitted that they ought to be set out by the tenth hill, but insisted that the growth of every tenth hill ought to be left upon the hill, with the binds cut and stripped from the pole, to be taken away by the tithe-owner to be picked elsewhere. Upon the evidence given in the cause it appeared to the court, that the practice insisted on by the defendant would, for the reasons given, be destructive to the tithe; but that to set out the tenth row, where the rows were equal, and when not, the tenth hill, and to leave it standing with the binds uncut for the tithe-owner, and for the impropriator to have a convenient time to come and cut the bind and pick the hops upon the ground, had been observed for above sixty years. This custom, usage, and practice, the court declared to be reasonable and fitting to be observed; at the same time pronouncing the common law obligation of setting out the tithes in kind to be as before mentioned. One is at no loss to find out the reason why the defence was overruled; but it is not so easy to discover the ground upon which the court could declare that the custom, usage, and practice alleged by the plaintiff was reasonable and fitting to be observed; at least, if by that language they meant (as seems to have been the case, though the decree is only for an account) to say, that it was obligatory on the tithe-owner, though it was contrary to the general rule of the law which they themselves in the same breath declared. How they applied this custom, usage, and

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practice, as they call it, the decree gives us no information. They may have decided upon the effect of a usage of sixty years *proprio vigore*, and independently on the consideration how far it might be evidence of something further: they may have considered it as evidence of a legal immemorial custom; or they may have considered it as evidence of a composition real. At any rate, the attention of the court was not drawn to the general point, whether either of the customs set up by the parties could have any foundation in law; the antiquity of either custom did not come in question, but only their comparative reasonableness, and on that alone the court determined. The authority of that case, therefore, does not weigh much in the present, when the point, as to the validity of any custom upon this subject, is directly made. The other case mainly relied upon to shew that a practice of long standing, although not properly a custom, may be considered as having the same effect in the case of hops, is that of *Sneyd v. Unwin* in 1740. There, the plaintiff insisted that the tithe should be set out in the manner now contended for by the defendant in error. The defendant relied on an ancient usage of tithing by the tenth pole or hill after the binds are severed from the ground. The court directed an issue to try "whether the usage was for hops to be tithed before they are picked from the stalk." From this it has been contended, that the court must have been of opinion that such usage might be good; but it is much too strong a conclusion, to suppose a court of equity pledged to any settled opinion on a matter which, by directing an issue, it confesses may be more effectually investigated at law, both as to the legal principles applicable to the usage proved, and as to the fact of usage itself. That a court of equity should pause and call for information on those heads for its own satisfaction before it proceeds to a decree, cannot, in fair reasoning, furnish such inference; and perhaps the court might be less scrupulous, as having the decree of *Chitty v. Reeves* before them, where their predecessors had been governed by a usage. In *Sneyd v. Unwin* the verdict was against the custom: whether that arose from the party upon whom the affirmative lay failing in his proof of the usage having long subsisted, or from the direction of the judge upon the effect of the usage, if it were proved to be of long standing, we have no means of knowing with certainty; but it is reasonable to suppose, that the

[1560] same reason would not have been set up twelve years afterwards, namely, in 1752, unless strong evidence of it had been given in the first cause; and the declaration of the court in the second cause seems to countenance an opinion, that the invalidity of the usage, in point of law, might have been the ground of determination, as it was declared that the method insisted on "was not the legal

method of tithing hops, but that they ought to be picked or gathered before the same are tithable," and decreed an account accordingly. The only just inference which can be drawn from that case is, that the court of equity did not then think proper, any more than another court of equity in the present case, to determine upon a matter of custom, without the assistance of an investigation of the facts *viva voce*, and of the law which should result therefrom.

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The usage insisted on by the plaintiff in error appears also to be defective in reasonableness; for it is stated in the bill of exceptions, that the occupier is to leave the tenth row, if equally planted, or the tenth hill, if unequally planted. This mode of tithing is therefore more open to fraud than that prescribed by the common law, since the planter has it in his power to determine which shall be the tenth row or hill, and accommodate his cultivation accordingly; and as many hills are weak and many die, and he can begin to set out from what part he pleases, it would require very little contrivance so to set them out, that the hills allotted to the parson should be those which are weak and blighted. This is not merely an opening, but an invitation to fraud. Authorities, however, have been resorted to, to shew that such a mode of setting out tithes has been considered as reasonable, and may be good by custom; and for this purpose the case of *Stebbs and Goodluck, Moor* 913. *Leon.* 99., has

Supra 158.

been relied on. According to the report in *Moor*, the parson, as he alleged, was to have every tenth land for tithe of corn, beginning with the land next the church; and the occupiers, knowing which of the lands would be the parson's, neglected to till, sow, and manure them, as they did their own; for which fraud the parson sued for tithe in kind, that is, every tenth sheaf, in the spiritual court; but the court of King's Bench granted a prohibition because the parson's remedy for the fraud was at common law. According to this report it does not appear that the validity of the custom was at all taken into consideration, but only that the parson, having sued in the spiritual court, and having stated a fraud, as the only ground on which his suit there was founded, is told that his

[1561]

remedy was at common law, and therefore a prohibition was granted. But in the report of the same case in *Leonard* the reporter states, that the opinion of *Wray* Ch. J. was, that the custom was against common reason, and void; but that if it were a good custom, then that the parson should have his action on the case at common law.

Nothing more seems fairly to be collected from the two reports, than that the court decided, that at all events the fact of fraud should not be tried in the spiritual court, the Chief Justice expressing his opinion as to the custom, from which no one is stated to have dissented. The *dictum* of Lord *Hobart*, in *Hide v. Ellis*,

Supra 492.

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Hob. 250., is the only other authority cited to the same effect. The point immediately in judgment in that case was, whether carrying the first crop of hay into the advanced state of tedding and putting it into wind-rows might be a compensation for exempting the second crop from the payment of tithes; and it was determined, as it has often been since, that it might, by way of assimilation to the case then at bar: the report states his lordship to have said, that in divers places they set out the tenth acre of wood standing, and so of grass. It must be observed, that the law of tithes was not so well ascertained in the time of Lord *Hobart* as it is at present, and many opinions then fluctuated upon matters which have since been settled. With respect to wood, indeed, if it were tithable only by custom, as it was at that time supposed to be, the tithe-owner could only have taken it in the way that custom gave it to him. But the proposition, as applied to grass or any subject tithable by the general law, is not warranted by any decisions ancient or modern, but contrary to the course of them all. There must in all cases, and without any exception, be a severance from the freehold, so that what was part of the inheritance may become a chattel, and vested in the parson. If this were not the case, the spiritual court would be ousted of its jurisdiction, for it can hold no plea of what relates to the freehold. In all the books, indeed, tithes are called lay-chattels; but till severed they are not so; they still remain parcel of the freehold; so that severance is essentially necessary. That a particular piece of wood-land or meadow-land, separately and immemorially enjoyed by the parson, may be a compensation for tithe of wood and hay, is undoubted; but no authority, except the *dictum* before mentioned, is to be found, to shew that the leaving a tenth of any tithable matter unsevered can be good by custom.

[1562]

The observation of Mr. Justice *Twysden*, in *Crouch v. Riden*, seems to have a contrary tendency to that which was contended for by the plaintiff in error. When he observes, that the legal manner of setting out the tithes of hops, whether by the hill, the pole, or the bushel, had not been settled, he must be understood to say, that in point of fact the tithe had been set out in these several ways in different parishes, but which of them was the legal way had not been then determined. Had he conceived that the practice, which had long obtained in each particular parish could constitute the legal mode in such parishes respectively, it is probable that he would have so said; but it seems plain, that he conceived some general rule, founded on principle, and applicable to all places, remained to be ascertained: that general rule has since been ascertained in the case of *Walton v. Tyers*.

The ground, however, upon which the plaintiff in error principally relied, was that of a real composition, which it was argued

might have taken place antecedently to the 13 *Eliz.*; but it is very doubtful whether the manner in which, or the time when the tithe itself shall be set out in kind, can be the subject-matter of a real composition, but only the discharge of tithe. In the *Codex* (a) it is said, that a composition real is, “when the incumbent, together with the patron and ordinary, make agreement, by deed executed under their hands and seals, that certain lands shall be discharged from the payment of tithes in specie, in consideration of a recompence to the incumbent, either in money, or in lands to him and his successors for ever, or in some other thing for their benefit and advantage.” So Sir *S. Degge* observes (b), that which we call a real composition is, where the present incumbent of any church, together with the patron and ordinary, do agree under their hands and seals, or by fine in the King’s court, that such lands shall be freed and discharged of payment of all manner of tithe for ever; paying some annual payment, or doing some other thing to the ease, profit, and advantage of the parson or vicar to whom the tithe belongs. Indeed, there are two requisites to constitute a real composition; namely, that the tithe shall be discharged, and that a compensation shall be given. Are these requisites to be found in this usage? That the tithes are not discharged must be admitted. Where then is the compensation? It was said that the parson was to have the binds; but the pleadings do not give them to the parson; and if they [1563] did, they are of no worth or value. It is obvious, that in this case the parson is to give up the benefit of having the hops picked for him, and to do it for himself at a great expence, and in an inconvenient manner. For this he receives nothing; for, according to the evidence, he is only to have the privilege of coming upon the land, of cutting the binds, and picking the hops, and then carrying away the hops when picked. To this agreement, it was argued, the parson might be induced to accede in order to tempt the occupiers of lands to plant hops, and to give encouragement to a very expensive cultivation. As to the inducement, if this were to be admitted as a compensation, it would equally well establish a custom of tithing corn, by setting out the tenth land; or apples, by setting out the tenth row; because, by a parity of reasoning, it might be presumed that the parson held out this favourable mode of tithing such articles, in order to tempt the farmers and occupiers of lands to employ their wood-lands or pasture in such culture as might produce more beneficial tithe to himself. In short, it would make good a composition or *modus*, to receive one-fifteenth instead of one-tenth of corn; for, undoubtedly, in all cases the less is taken from the tithe of any

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(a) *Gibson's Codex*, tit. 30. c. 5. p. 705.

(b) *P. ii. c. 20.*

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article, the more the occupier is encouraged to cultivate that article; and if this alone were to be admitted as a sufficient consideration, the objection of want of consideration would not lie in any case. If, therefore, on the presumption that the tithe had been originally so granted, or on any other supposition, this method of setting out the tithe of hops might by immemorial usage be supported, still the argument will not apply to the present case, wherein no immemorial usage can have existed; and if the tithe-owner, at the first introduction of hops, had a right to his tithe by measure, the objection remains unanswered, that the composition cannot be good, because he parts with that right without receiving any compensation.

Supposing, however, that this can be the proper subject-matter of a real composition, it will be right to examine the nature of the evidence upon which the composition is attempted to be supported. In fact, the evidence is not applicable to a composition real. It consists wholly of usage, and is that sort of evidence which is applicable to a *modus*, but has no reference to a particular deed of composition. Usage, in general, is a ground for presuming deeds even against the crown; yet, in the particular instance of composition for tithes, it is settled, that where the deed cannot be produced, some evidence must be given referring to the deed, or shewing that it did exist independently on mere usage. And the reason why this has been so held is stated to be, that if it were otherwise the church would be defrauded, and every bad *modus* turned into a good composition. *Heathcote v. Mainwaring*, 3 Bro. Chan. Cas. 217. Indeed it may be collected from the Year-book, 34 H. 6. fol. 36., that the ancient law was, that an annuity founded on a real composition, in discharge of tithes, could only be claimed by producing the deed of composition, or by alleging an immemorial prescription. The presuming a deed from long usage is certainly a novel invention of the Judges for the furtherance of justice, and the sake of peace, where there has been a long exercise of an adverse right. For instance, it cannot be supposed that any man would suffer his neighbour to obstruct the light of his windows, and render his house uncomfortable, or to use a way with carts and carriages over his meadows for twenty years respectively, unless some agreement had been made between the parties to that effect, of which the usage is evidence. But with respect to compensation for tithes the same reason does not obtain, because temporary agreements are made and continued for the convenience of parties during a succession of incumbents. There is no exercise of an adverse right, which is generally deemed necessary to raise the presumption. The best evidence of an agreement for a real composition having actually taken place is the deed

itself, but that can rarely be expected. In the case of *Sawbridge v. Benton*, * *Austr.* 375., instruments were given in evidence which strongly denoted, that such an agreement must have taken place, as they related, with a reasonable degree of probability, more peculiarly to such a transaction than to any other; wherefore the real composition was supported. Indeed it appears to have been invariably holden, that some evidence must be adduced to shew that such an agreement, though lost, did once exist. Such was the opinion of the court of Exchequer, in the cases of *Robinson v. Appleton*, and *Hawes v. Swaine*, 4 *Wood*. 303.; and such was the opinion of Lord Northington in *Rotherham v. Fanshaw*.

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* *Supra*
1327.

Supra 1101.

Supra 1177.

In the present case there is wanting that which is indispensably necessary where a real composition is to be presumed; namely, mutual loss and gain on the respective parts of the parson and occupier. When the occupier has long retained that which by law he ought not to retain, and yields to the parson that which by law he is not bound to yield, this mutuality of loss and gain, [1565] acquiesced in for a great length of time, is strong corroborating evidence of such an agreement having been executed by the necessary parties; but, when this mutuality is not to be found, the presumption must be, that no agreement took place whereby the parson consented, with the permission of the patron and ordinary, to forego his legal rights without any retribution. The bare fact, therefore, of the parson having been in the perception of less than what is due to him, or of that which is due in a less beneficial manner, is not of itself a ground for presuming a real composition: and this was the opinion of *Rolle*, as appears in the case of the Earl of *Hertford v. Leach*, 8 *Car.* 1., when, in stating what he conceives were the reasons of the court for holding that certain lands were not discharged of tithes, he gives this as one, that it shall not be intended that any real composition or consideration was given for the discharge of tithe, without shewing that, specially, "such has been considered to be the law ever since."

Supra 486.

From this course of reasoning it follows, that the tithe of hops by the principles of the common law is payable from the true time of the severance of this tithable matter, namely, from the picking; that no custom or *modus* can apply to this, any more than to many articles of modern introduction; that no long practice, even though concomitant with the introduction of the article itself, can have the effect of a custom or *modus*, and vary the legal principle by which the tithe is to be set out; that, as a real composition, the mode of tithing contended for cannot be supported, since it does not fall within its definition; that if it did there is in this case no evidence whatever of the existence of a deed of composition; that

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the usage contended for would furnish to the farmer a temptation, almost irresistible, to cheat the parson, and would subject the property of the church to imminent peril; and therefore that upon the matter set out in the bill of exceptions, the direction was rightly given to the jury to find for the defendant.

The judgment was affirmed.

ADDENDA.

M. 31 H.VI. A.D. 1453.

[Year-book, 11 a. pl. 7.]

1453.

A writ of trespass was brought against one by a parson, for taking and carrying away his corn in the sheaves lying in a certain place. The defendant justified, as servant to another parson, the taking them as tithes within his parish which were severed from the nine parts, and gave colour to the plaintiff. The plaintiff shewed, that he was parson of a church adjoining to the other parish, and that he had a portion of tithes in that place, and was possessed of them, and made a sufficient title as parson. And inasmuch as the defendant had acknowledged the trespass, he prayed his damages.

The right of tithes is a question of mere ecclesiastical cognizance, though one of the parties should happen to be a lay servant of the parson who claims them.

Hingeston. — Upon his own shewing, we pray that the court be ousted of jurisdiction.

Laicon. — And we pray our damages for want of an answer; for we cannot sue the servant in court christian, because he is a lay person, any more than we can sue the farmer of a church; and therefore the court shall have jurisdiction.

Fortescue. — It appears to the court that the right of tithes is in question, and that all which the servant did was in his master's right; and if issue should be taken in this court, the servant would have aid of his master. Parsons cannot gather their tithes themselves, and must, therefore, of necessity employ servants; and as it appears that what the servant did in this case was in the right of his master, the right of tithes, which belongs merely to court christian, would be determined in this court, if we were to proceed. Therefore by the award of this court, upon your own shewing, sue in court christian.

M. 29 & 30 Eliz. A.D. 1588.

[1567]

Baskerville v. Clarke.

17th October 1588, Exchequer Chamber.

UPON hearinge of the matter in controversy betweene *Wm. Baskerville* gent. and *Jenebor* his wife, the queene's majestie's farmers

A vicar entitled to all manner of

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tithes sub-
ject to par-
ticular ex-
ceptions, is
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not being
one of the
excepted
articles.

of the personage of *Colshill*, in the countie of *Berks*, plaintiffs, and *John Clarke* gent. defendant, beinge for withholdinge and subtractinge of the tithes of oade, sowed by the said *John Clarke* after the ploughe, in certeyne grounds lyinge and beinge within the tithable places of the parish of *Colshill* aforesaide, parcell of a ferme there called *Hint Ferme*: Forasmuch as it appeareth by composition shewed in this court under the seale of the chauncelour of *Sarum*, that all manner of tithes, oblations and obventions whatsoever, belonginge to the church of *Colshill* aforesaide (*decimis garbarum et fœni ac mortuarijs vivis duntaxat exceptis*), have belonged to the vicar of the saide church for the tyme beinge; and for that also it is proved in this cause by depositions, that the vicar of the saide church for the tyme beinge, hath had the tithes of those groundes where the saide oade was sowed for the most parte by the space of xxie yeares nowe last past: It is therefore ordered by the courte, that the saide plaintiffs, and all other fermers of the saide personadge, be from hencefoorth barred to demaunde or have any tithes of oade, growinge, renewinge or cominge in and uppon the saide groundes, and that the tithes of the saide oade nowe sued for by the saide plaintiffs, and of all other oade which at any tyme or tymes hereafter shall grow, renew, or come in and uppon the same groundes shall be and remayne to the vicar of the saide church and his successors, as in the righte of the vicaridge there.

[1568]

P. 33 Eliz. A.D. 1590. B.R.

Green v. Penilden. [Cro. Eliz. 228.]

If the spi-
ritual court
will not
suffer the
tenant to
plead to the
right of the
incumben-
cy, a probi-
bition lies.

3 Keb. 217.

PROHIBITION for suing for tithes was prayed; for that the plaintiff had pleaded in the spiritual court, that *Penilden*, the defendant, was not lawful incumbent, but one *Taylor*; which plea the court would not allow the parishioner to plead to the right of the incumbency. It was granted *per curiam*; for he being the tenant of the land may plead it, else he would be twice charged for his tithes.

Kendal v. Pearm, S. P.

P. 38 Eliz. A. D. 1596. B. R.

Higham v. Best. [Cro. Eliz. 625.]

An endow-
ment of the
tithes of a
manor
charges the
lands of the

TRESPASS upon demurrer. The case was, a vicarage was endowed with the tithes of the third part of the manor of (a) *D.*; and whether the vicar thereby should have the tithes of the third part of the demesnes, and of the freeholders also, was the question.

(a) The words of the endowment, according to Owen, were: *Volumus quod vicarius, &c. habeat tertiam partem decimarum bladorum et fœni quod-
modocunque provenientium de manerijs de Bad-
manshall.*

And after argument at the bar, it was resolved by *Popham* and *Fenner* (for the other justices were not in court), that the vicar should have tithes, as well of the freeholders as of the demesnes. For *Fenner* said, that an endowment is to be construed according to the intent of the parties, which (without doubt) was, that the vicar should have tithes throughout the manor. And therefore if the queen grants unto me conusance of all pleas within the manor of *D.*, I shall have conusance of pleas between the freeholders of the manor.

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Higham

v.

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freeholders
as well as
the de-
mesnes.
Owen 58.
S. C.

[1569]

Popham. — If the queen grants me free warren within my manor of *D.* I shall have it within my own demesnes only. For if otherwise, the queen should impose a charge upon another person, which the law will not suffer. So it is, if the lord grants a rent charge out of his manor. But, if the queen grants to me *felons' goods* or *waifs* and *estrays* within my manor, I shall have them in the lands of the freeholders. For it is a liberty due to the queen, which she may grant, and is not any charge to the subject; for she hath it in every man's land, and therefore may grant it to any other. So this composition doth not create a new charge, but is a disposing of the ancient, which was due by the tenants; for it runs through all the limits of the manor, as well to the freeholders, as to the demesnes. But, if the lord had made such a grant before the council of *Lateran*, it would not have charged his freeholders, but his own demesnes only.

And it was adjudged accordingly for the vicar.

P. 43 Eliz. A.D. 1601. B. R.

Sands v. Drury. [Cro. Eliz. 814.]

ACTION sur trover of twenty loads of hay. Upon not guilty pleaded, a special verdict was found, that this hay was parcel of the tithes severed from the nine parts appertaining to the rectory of *Hackley*, and demised and demisable time, &c. *secundum consuetudinem manerii de Hackley*; and that the prior of *Newbury* was seised in fee of the manor and rectory of *H.*, and in 27 *H.* 8. demised those tithes by copy to *H.* under whom the defendant claimed; and afterwards by the dissolution, &c. the manor and rectory came to king *Hen.* 8., who conveyed it to the archbishop of *York*, who let that rectory to the plaintiff, who claimed these tithes; and the defendant under pretence of that copy carried them away. *Et si*, &c. The sole question was, whether these tithes were grantable by copy, &c.? and it was moved for the plaintiff that they were not. First, in respect to the nature of tithes, wherein none could have any property before the council of *Lateran*, which was in the time of king *John*; for before that time every one might have paid them

Tithes are
not demis-
able by
copy of
court-roll,
for they
cannot be
parcel of a
manor.

1601. to whom he pleased, but by those constitutions they are annexed to the rectory. It is then impossible that there should be any custom *to demise them by copy from time, &c. when, as none had interest in them but within time of memory. Tithes also cannot pass unless by deed; and therefore to grant them by copy of court-roll cannot be good. There cannot also any thing pass by copy but that which is parcel of the manor: but it hath been adjudged that tithes cannot be parcel of the manor. Wherefore, &c. And of that opinion was *Popham*, for the first and last reasons; for although common and *prima vestura prati* may be granted by copy, because they are parcel of the manor, yet tithes cannot be so, because they cannot be parcel of a manor; for a manor and tithes are of several natures, although they be united in one man's hand; and then it is not possible, that that which is not a parcel of a manor can be demised *secundum consuetudinem manerii*. And therefore it was adjudged in the time of queen *Mary*, in the case of the duke of *Suffolk*, that where one had two manors, and granted a copyhold of the one manor at the court of the other manor, that it was a void grant; for it cannot be a copyhold, according to the custom of a manor whereof it is not parcel. But *Gawdy* doubted thereof, and conceived it had been well enough if it had been so used from time whereof, &c. But, because on the verdict it did not appear that it had been granted by copy from time whereof, &c. it was held, that there was not any title found for the defendant; and therefore adjudged for the plaintiff.

M. 43. & 44 Eliz. A. D. 1601. B. R.

Nowell v. Hicks. [2 Inst. 653.]

A custom creating an inheritance cannot be waived by matter *in pais*. An established custom cannot be affected by a modern temporary interruption. 2 Ro. Abr. 271. pl. 9. & Co. Litt. 114 b. S. C.

IN a prohibition between *Nowell* and *Hicks*, vicar of *Edmonton* in *Middlesex*, the plaintiff in the prohibition alleged a custom within the said parish of *Edmonton*, time out of mind to pay for every lamb a penny, &c. Issue was taken upon the custom, and the jury found, that before twenty years last past time out of mind there was within the said parish such a custom and *modus decimandi*; but for twenty years last past, by reason of suits and troubles, the inhabitants of the said parish had paid tithe lambs in kind; and in this case these two points were adjudged. First, when a custom doth create an inheritance, this cannot be waived or annulled by payment or other matter *in pais*. Secondly, albeit that the *modus decimandi* had not been yielded or paid by twenty years, yet the prescription may be general, for that the custom once established doth continue. As, if a man hath a common of pasture, &c. and taketh a lease of the land, &c. for many years; yet, after the years ended, he may prescribe generally; for the inheritance of the

[1571]

common continued: and if the law should be otherwise, it were dangerous for the parties that do prescribe; for one year, and ten or twenty years, is all one in judgement of law. And herewith agree the books in 15 *E. tit. 3. Judgement* 133., in a writ of mesne. 14 *E. 3. ibidem* 155.

1601.

Nowell
v.
Hicks.

Tr. 44 Eliz. A. D. 1602. B. R.

Heale v. Sprat. [2 Inst. 649.]

IN a prohibition between *Walter Heale* and *John Sprat*, the case was, *Walter Heale* set out his predial tithes, and divided them justly from the nine parts, and soon after carried the same away. *Sprat* sued for subtraction of the same in the ecclesiastical court. *Heale* pleaded that he had set them out *ut supra*; whereunto *Sprat* said, that presently after his setting out, &c. he carried them away *in fraudem legis*. Adjudged, that this was fraud and guile within the act of 2 & 3 *E. 6.* albeit he did justly divide the same within the letter of this law. It was further resolved, that if the owner of the corn before severance grant the same to another, of intent that the grantee should take away the same, to the end to defraud the parson of his tithe, this is fraud and guile within this statute.

Though predial tithes have in fact been set out, yet, if afterwards carried away by the occupier, such setting out is fraudulent within the statute of 2 & 3 *E. 6.*

Tr. 9 Jac. A. D. 1611. B. R.

Pothill v. May. [1 Bulst. 171.]

IN a prohibition, the case was as follows: the defendant being parson of *D.*, libelled in the spiritual court for tithes for *silva cædua*, and for the herbage for depasturing geldings. The plaintiff there shewed, that these geldings were hackney geldings, which he kept for his pleasure, and for himself and his servants to ride upon, being his saddle horses; and this plea being there refused, for this cause he prayed a prohibition. The whole court were clearly of opinion, that here was a good cause for a prohibition; for that these horses are not tithable, nor is any tithe herbage to be paid for them. Otherwise it were, if they had been cattle bought and fatted to sell again for gain, for the herbage of these he ought to be answerable to the parson; but not for the herbage of geldings kept by him, and used only for his pleasure. The whole court agreed in this; and therefore in this case, by rule of the court, a prohibition is granted (*a*).

Agistment-tithe is not due for saddle-horses, or horses used merely for pleasure.

[1572]

(a) In 1 Ventr. 236. *Hale* is reported to have said, that no tithes are to be paid for saddle-horses. (*Underwood v. Gibbon*, *infra* 1582. *Qu.* Whether tithes are due for coach-horses kept merely as such? *Thorpe v. Bendlowes*, *supra* 899. 3 Burn's E. L. 474.)

1611.

Anon.

Tr. 9 Jac. A.D. 1611. B. R.

Anon. [1 Bulstr. 108.]

Though the tithes may be in fact set out, yet if the parishioner refuses to let the parson come for them by the usual way, the parson may sue for them in the spiritual court.

NOTE, upon the stat. of 2 & 3 E. 6. The parson libels for tithes; upon which the case appears to be as follows: The parishioner, who was to pay his tithes, sets them out according to the statute; but, they being so set out, he would not suffer the parson to come and take them away, thinking by this means to avoid the statute. The parson thereupon libels in the spiritual court for these tithes: the defendant there surmises, that he did not hinder him from having his tithes, but saith, that he hindered him from coming for them one way (which was the usual way), but that he might have come for them another way; and upon this he applies for a prohibition, which was granted, upon a supposition, that here was no question at all as to the payment of tithes, but as touching the way to come for them. And upon this whole matter the parson prayed a consultation.

The whole court were clearly of opinion, that such a setting out of tithes, as it appeared to be in this case, without suffering the parson to come and take them away, was a fraudulent, and not a good and sufficient setting out of tithes according to the statute, and as the statute requires, which ought to be fruitful and effectual; for he ought to set them out, and also to suffer the parson to come, have, and take them away, otherwise the mere setting of them out and the suggestion of the way are to no purpose. And so, without any further motion or argument, by the rule of the court, a consultation was granted. *Quod nota.*

[1573]

M. 10 Jac. A.D. 1612. B. R.

Reynolds v. Greene. (a). [2 Bulstr. 27.]

Wood is *de jure* a great tithe, but may pass to the vicar by usage under the words *alteragium & minuta decimæ*. 2 Ro. Abr. 335. pl. 8. S. C. Wood v.

NOTE, that in a trial at bar in an action of trespass, the question arising between the parson and the vicar, as touching tithe-wood, and to whom the same belonged; as to this by the opinion of the whole court, clearly, the parson, *de mero jure*, ought to have the tithe-wood, if the vicar be not endowed of the same, or claim to have it by prescription; but without such a dotation or prescription, the same belongs to the parson.

Another question was propounded for the vicar, who entitled himself unto the tithe-wood by these words, *alteragium et minuta decimæ*, whether these words will carry the tithe-wood to him or

(a) The note of this case is longer in the original; but, I trust, it is sufficiently full as here stated, and clearly conveys the opinion of the court. I am not aware that I have omitted any

thing, but what the reader would have been provoked to meet with, but tautology and nonsense. The same remark applies to the case of *Pothill v. May*, *supra* 1571.

not. As to this, the exposition and true definition of the word "*alteragium*" is considerable, and to whom this is due. *Alteragium*, as was observed, is that which is due to be served at the altar.

1612.

Reynolds
v.

Greene.

Fleming C. J.—There is a usage here laid in the vicar to have the tithe-wood by reason of these words, *alteragia et minutæ decimæ* the which the vicar can no ways have but by prescription, or such a usage; and so the same may pass by these words *alteragia et minutæ decimæ*, and the usage had accordingly. Also, sheaves of corn have passed by usage to the vicar by the words *alteragia et minutæ decimæ*, and so it was adjudged in the court of Exchequer.

Greenwood,
Hetl. 135.
& *Litt.*
Rep. 243.
S. P.

The Judges all agreed in this, that by these words, *alteragia et minutæ decimæ*, by usage, tithe-wood may well pass, and so hath the opinion of all the civilians been.

P. 14 Jac. A.D. 1616. B. R.

[1574]

Buck v. Witt. [1 Ro. Rep. 354.]

BUCK sued *Witt* in the spiritual court for tithes, and now *Trotman* prays a prohibition upon the clause in 2 & 3 E. 6. respecting barren land, suggesting that the land for which the tithes were demanded was lately gained from the sea, viz. the *Severn*, at the costs of the tenant; that it was before merely barren land, and that no grass grew upon it, and therefore he submitted, that it was barren land within the statute, and not tithable within the time limited by the statute.

Land gained from the sea, if not barren of its own nature, is not barren land within the statute of 2 & 3 E. 6. 3 Bulstr. 166. S.C.

Bridgeman.—The land in question is very good land, and bears corn without any charge in the manurance.

Coke.—It was holden in *Farrington's* case, that if a man stocks up a wood and converts it into arable land, that this is not barren within the meaning of the statute, because the land of its own nature is not barren. This was agreed to by *Dodderidge*, who said, that if a man has a salt marsh, which has used to be overflowed by the sea, and he makes a fence against the sea, and lays it down in meadow; this is not barren land, but tithes shall be paid of it, for of its own nature it is not barren. To which *Coke* assented, and said, that such land only shall be said to be barren as is barren of its own nature, and made arable by labour. (a)

By *Coke*, *Dodderidge*, and *Haughton*, the land in the case at bar is not barren of its own nature; for that land is not barren which can bear corn without costs, as this does, and therefore tithes ought to be paid for it.

Trolman.—But in this case the party has been at great costs in

(a) Or, as it seems better stated in *Bulstrode's* Report, "Barren ground, by this statute, is such ground as will not bear corn of itself without very great costs in the extraordinary manuring of it."

1616.

Buck
v.
Will.

raising a mound to make this good land by the exclusion of the sea, and the statute was made for the encouragement of good husbandry.

By the Court.—That is all one, where the land of its own nature is not barren.

The prohibition was accordingly refused. (a)

[1575]

M. 16 Jac. A. D. 1618. B. R.

Moore v. Bullock. [Cro. Jac. 501.]

A surmise in prohibition that an abbot was seised in fee of a certain close, and took the profits thereof in lieu of the tithes of hay, is sufficient without saying that it was given time immemorial in recompence of the tithes, &c.

PROHIBITION; the surmise was, that the abbot of *Beunchiefe*, in the county of *Derby*, was seised in fee of the rectory of *Norton*, which was appropriated to the said abbey time whereof, &c. and was seised in fee of a close called the *Meadow Close*, in *Greenston*, in the parish of *Norton*; and held the said close, and took the profits thereof in lieu of all tithes of hay within the said hamlet of *Greenston*: the defendant pleaded, that the abbot was seised in fee of that close as parcel of such a farm, and traversed that he had it, and took the profits thereof in lieu of the tithes of hay in the said hamlet; and issue being joined thereon, it was found for the plaintiff. It was now moved in arrest of judgement, that the surmise was not good; for he shewing that he was seised in fee, that is as parcel of the glebe, and it cannot be in recompence of the tithes: but it ought to have been shewn, that it was given in ancient time in recompence of the tithes, or that he and his predecessors time whereof, &c. have had the occupation of that close, and the profits thereof in lieu of tithes; and not that he was seised, which shall be intended as parcel of the glebe. *Sed non allocatur*; for it is a better form to say, that he was seised in fee; for it is so ancient, that it cannot be shewn when or by whom it was given: but having had it always in lieu of tithes, it is good enough, and shall be intended to be given before time whereof, &c. in recompence of the tithes; and that in regard of that land the discharge of those tithes had its beginning: wherefore it was adjudged for the plaintiff. Vid. 8 *Ed.* 4. 14. *Co.* 2 *Rep.* fol. 44. *Pigot* and *Herne's* case; and the case of *Somerton v. Dr. Cotton**, cited in *Austen v. Pigot*,† where such a prescription was held to be good.

Supra 200.

* Supra 199.

† Supra 217.

[1576]

M. 10 Car. A. D. 1634. B. R.

Taylor v. Wymond. [Maynard's MSS. Reports, 139.]

If a parson sue for tithes in

A VICAR libelled in the spiritual court for tithes; the parishioners pleaded there a *modus decimandi*, and the plaintiff confessed it,

(b) See *Sherington v. Fleetwood*, supra 189. *well v. Terry*, 823., and *Jones v. Le David*, supra n. (b), where the cases are collected; also *Stock-* 1335.

and prayed tithes according to the *modus*. Upon motion a prohibition was granted *per tot. cur.*; for the vicar ought to have libelled for the *modus*, not for the tithes in specie. But upon the vicar consenting to accept the *modus* without costs, the rule for the prohibition was discharged, which the court would not do but upon those terms, because his suit was wrong.

a *modus* be there pleaded, which he confesses he cannot proceed for, he ought to have sued for the *modus*.

1634.

Taylor
v.
Wymond.

kind in the
spiritual
court, and
sued for the

H. 19 & 20 Car. II. A. D. 1668.

Croucher v. Collins. [Saund. 141. B. R.]

PROHIBITION.—The plaintiff declared, that from time whereof, &c. there had been a rectory impropriate and a vicar within the parish of *Cerhampton* in the county of *Southampton*; and that from time whereof, &c. there had been a great quantity of arable land, amounting to four hundred acres and more, within the same parish; and that husbandry had been much used there, and the greater part of the land there had been sown with grain in every year; and that the corn there growing could not be preserved without fencing the lands where it grows; and that the tithes of corn so fenced had been always paid to the impropriator of the rectory of the same parish. And the plaintiff further shewed, that within the parish there is a custom for underwood, that if any person cut his underwood, and use the same for fencing the corn, the tithes whereof are paid to the rector, and not sold or otherwise disposed of, whereby the tithes are preserved; in that case the underwood so used hath been discharged from the payment of tithes to the said rector. And the plaintiff further shewed, that he himself cut down underwood within the same parish; and that all such wood, without any sale or any other profit made thereof, was used and applied in and towards the making and repairing of hedges, inclosing one hundred acres of arable land sown with corn for the preservation of the corn there growing, and was not otherwise disposed of. Yet the said defendant, being impropriator of the said rectory of *Cerhampton*, had sued the plaintiff in the spiritual court for the tithes of the wood so by the plaintiff cut and used, in and towards the fencing of the corn, whereof the defendant had the tithes, and endeavoured to condemn the plaintiff there to pay the treble value of the tithe of the said wood so used. And although the plaintiff had delivered unto the defendant a writ of prohibition to stay the suit in the spiritual court, yet he proceeded afterwards, notwithstanding the said writ, in contempt of the king, and to the damage of the plaintiff, &c.

A plaintiff
in prohibi-
tion declar-
ed upon a
prescription
to be dis-
charged of
the payment
of tithe of
underwood
when used
as fence to
corn, of
which the
parson
received
tithes; and
disallowed,
because not
averred that
the corn so
fenced with
the under-
wood was
his own
corn.
2 Keb. 319.
S. C.

[1577]

1668.

Croucher
v.
Collins.

The defendant, as to the contempt in suing in the spiritual court after the writ of prohibition delivered to him, pleaded not guilty; but for having a consultation he demurred to the declaration.

And it was argued by *Jones* for the defendant, that the custom was void and unreasonable, because it is not said that the corn, which was inclosed with the wood cut by the plaintiff, was his own corn. And it would be unreasonable that the rector should not have tithes of the wood, if it were used for the inclosure of other than his own corn; for in that case, one who has three hundred acres or more of wood, may cut it down and give it all to whom he pleases to inclose their corn, and by that means the rector would be defrauded of his tithes of wood, which would be a great prejudice to him, and therefore he concluded that the prescription was void and unreasonable.

For the plaintiff it was argued, that this prescription was good enough; for in *East and Harding's* case, *Cro. Eliz.* 499., it is said, that if one cut wood for fencing his own corn, he shall not pay tithes for it; and so it is said in the parson of *Mildenhall's* case, *Moor* 683. And *The Doctor and Student*, in the last chapter, c. 5. 299. says, that a county may prescribe in a *non decimando* for a thing certain, if the parson has other sufficient maintenance. And in

Supra 217.

Supra 1575.

Supra 200.

Supra 167.

[1578] 42 *Eliz. Cro. Eliz.* 736. *Austin v. Pigott's* case, and *Cro. Jac.* 581. *Moore v. Bullock*, prescription that the parson had such land in lieu of tithes is adjudged a good *modus*; and *Pigot and Herne's* case, cited in the bishop of *Winchester's* case, the lord of a manor paid to the parson 6*l.* a year, and for it had a tenth part of the corn; this is a good prescription. All which cases prove, that if the parson has a recompence, it is immaterial whether the party, who derives the benefit by the *non decimando*, pays towards it or not. And in the case at bar, it was all one to the rector, whether the corn was the plaintiff's own corn, or any other person's, so long as he had the tithe of it; for the rector has no loss by it. Then the plaintiff has no more, but rather less benefit, by giving his wood to his neighbours to inclose his corn, than if he had inclosed his own corn therewith: but if he had sold the wood or made any benefit thereof, it would be reasonable that he should pay tithe for it; but it is expressly averred to the contrary. And so the plaintiff has not any benefit, nor the defendant any loss, from the giving of the wood to inclose the corn, of which the defendant has the tithes. And if the plaintiff had used the wood towards repairing the fences of his own corn, it is clear that it would have been a good prescription. And this case does not differ in effect from it, for the defendant has the same benefit as he would have had if the corn had been the plaintiff's own corn; wherefore it was prayed, that the prohibition should stand.

But the whole court, without any regard thereto, adjudged the prescription bad, and that the plaintiff could not give his wood to any other person to inclose corn without paying tithes for it. And it was so adjudged, and a consultation awarded: *quod nota*. *Wylde Serjeant and Saunders* of counsel with the plaintiff.

1668.

Croucher
v.
Collins.

Note, that *Wylde* told me afterwards, that it was a case that deserved greater consideration than the court gave it; and that he did not think the court would have given judgement so suddenly.

P. 21 Car. II. A.D. 1670. B. R.

Mr. Justice Moreton's Case. [1 Ventr. 30.]

MR. J. *Moreton* brought debt as executor, upon the 2 & 3 E. 6., for not setting forth tithes due to the testator. Upon *nil debet* pleaded, and a verdict for him, it was moved in arrest of judgement, that this being a forfeiture given by the statute for a *tort* done to the testator, the action could not be brought by the executor. To which it was answered, that this action was maintainable within the equity of the statute of the 4th of E. 3. which gives the executor trespass *de bonis asportatis in vitâ testatoris*. So, an *ejectione firmæ* lies upon an ejectment done to the testator; and trover and conversion, where the conversion was in the time of the * testator. 1 Cro. 297. adjudged (a), that an executor may bring an action upon the case against the sheriff for an escape, upon mesne process, suffered in his testator's lifetime. And the court were clearly of opinion for the plaintiff, and said it had been formerly resolved so in the Exchequer Chamber. (b)

An executor may bring debt upon 2 & 3 E. 6. for not setting forth tithes due to the testator.

1 Sid. 407. S. C.

2 Keb. 502. S. C.

1 Sid. 88. S. P. Sir T.

Raym. 57. S. P.

* [1579]

M. 25 Car. II. A.D. 1673. B. R.

Fossett v. Franklin. [Sir Tho. Raym. 225.]

THE lands were parcel of the possessions of the prior of *St. John of Jerusalem*, and came to the crown by 32 H. 8. cap. 24., and were parcel of *St. John's* wood in the parish of *Marybone* and *Hampstead*; and whether they are discharged from payment of tithes by 32 H. 8. cap. 24. was the question upon a trial at bar, and a special verdict found thereupon. But it seemed to *Hale* Chief Justice, that they shall not pay tithes, by reason of the word (privileges). And in *Whitty v. Weston* †, *Bridgman* 32. *Latch*. 89. *Godbolt* 392.

Lands formerly part of the possessions of the prior of *St. John of Jerusalem* are discharged of the payment of tithes.

3 Keb. 208. 217. S. C.

† Supra 410.

(a) It does not appear to have been adjudged, for *Croke* ends with an *adjournatur*, and *Rolle* with a *dubitatur*.

(b) *Twysden* J. said, The constant difference hath been in actions by executors, which lie well,

but not against them; which the court agreed. And per *Keeling*, This is a duty trebled by the statute, and not a bare penalty. Vide *Keble's* report of this case.

1673.

Fossatt
v.*Franklin.** *Supra*
224.† *Supra*
250.

pl. 478. the court were divided. But 2 *Cra.* 57. *Moor* 913. *pl.* 1291.* *Cornwallis v. Spurling*, in debt upon 2 *Ed.* 6., judgement was given that the lands are tithable; and so in a prohibition, 2 *Brownlow* 8. 20.† *Urrey v. Bower, adjournatur.* But *Dyer* 277 *b.* *pl.* 60. is, that they are not tithable. And judgement was afterwards given for the defendant; and resolved the lands are not tithable.

H. 8 Wil. III. A.D. 1695. B. R.

Gale v. Ewer. [1 *Com. Rep.* 22.]

Turning
cattle into
tithes makes
it a fraudulent
severance, and
the spiritual
court hath
cognizance
of a refusal
to set out
tithes.

‡[1580]

A PROHIBITION was moved for to the consistory court of *London*, where *Ewer*, the rector of *Ingatestone*, libelled for refusing to set out tithes, or if they were set out, such setting out or severance‡ was in the absence of, and without giving notice to the rector; and also, that the plaintiff after severance, without notice to the rector, took the nine parts, and turned his cattle into the meadows where the tithes were, which destroyed and consumed the tithes: and upon a suggestion, that by the statute 2 *Ed.* 6. *cap.* 13. all the king's subjects ought justly to set out their tithes, &c., and that the plaintiff had separated them from the other nine parts; and whereas the exposition of all statutes belongeth to the temporal judges; and whereas tithes divided from the nine parts are lay chattels, and a suit for trespass, &c. is merely temporal, this motion was made.

And, first, it was urged, that the spiritual court ought not to proceed for refusing to set out tithes, but for the subtraction of them only: for by the statute 2 *Ed.* 6. *c.* 13. it is enacted, that if any person do subtract or withdraw any manner of tithes, &c. the party so subtracting or withdrawing the same may or shall be convented or sued in the king's ecclesiastical court, &c. And the clause which gives the suit in the spiritual court for the double value says, if any person carry away his corn before the tithe thereof set forth, &c.; so that the suit in the spiritual court ought to be for the subtraction only, and not for refusing to set the tithe out: the clause which provides, that all the king's subjects shall duly set out their tithes, gives the penalty of treble value, but the remedy is by action of debt in the temporal courts. This clause for the setting out of tithes is introductive of a new law, as appears by 2 *Inst.* 649.; and, by consequence, the exposition thereof appertaineth to the temporal courts, which ought to judge whether the tithes were duly and without fraud severed and divided; for the manner of tithing ought not to be governed by the canon or civil law.

A prohibition was granted. *Trin.* 1 *W. & M.*, upon a suggestion that tithes were set out. 2 *Vent.* 48. But in the present case the

1695.

**It is not
necessary
by the com-
mon law to
give notice
of the set-
ting out of
tithes.**

[1581]

S. C.
1 Wood's
Decr. 528.
Rayn. 109.
Bun. 19.
Mr. Cuse's
MSS.
F. F. 155.

2 Equ. Ca. Abr. 794.

1715.

H. 2 Geo. I. A.D. 1715. Scac.

Underwood

v.

Gibbon.

S. C.

1 Wood's

Decr. 534.

Agistment-

tithe is pay-

able by the

occupier,

not the

agistor ;

and none is

due for saddle-horses,

profitable, or cattle killed for domestic uses.

Underwood v. Gibbon. [Bunb. 3.]

RESOLVED by *Bury, Price, and Mountague*, barons, that the tithes for depasturing unprofitable cattle ought to be paid by the occupier of the ground, and not the agistor (a); and by Lord C. B. *Bury, and Price*, contra *Mountague*, that saddle-horses shall pay no tithes (b), any more than cattle for the plough and pail, or cattle killed for the use of a man's own family, in respect of the profit that otherwise accrues to the parson from these.

that otherwise accrues to the parson from these.

H. 12 Geo. I. A. D. 1725.

Geale v. Wyntour. [Bunb. 211.]

Plea of a

decree after

verdict to

establish

modus

allowed to

a bill for

tithes in

kind.

The suit of

1718.

2 Wood's

Decr. 103.

BILL for tithes as vicar of *Bishop's Lydiatt*, in the county of *Somerset*, sets forth a former bill in this court in 1717, and a decree in 1718, for these tithes, after issue to try *modus*, and verdict for the plaintiff.

The defendant pleads, that in *Trinity Term* 1721, he preferred his bill in the court of Chancery to establish the *modus*, which were thereupon decreed to be established; and he pleads the same verdict and decree in bar of the plaintiff's now demand; and the plea was allowed *per totam curiam*.

P. 20 Geo. II. A.D. 1747. Canc.

Carte v. Ball. [1 Ves. 3. Reg. Lib. 1746. A. fo. 704.]

S. C.

3 Atk. 496.

Partially

reported,

supra 797.

The vicar

failing in a

suit for

tithes in

kind, and

a *modus*

being set

up, which

was good

in its na-

ture, though

imperfectly

pleaded,

the vicar

may yet

recover in

THE bill was brought by the plaintiff as administrator of his brother, late vicar of *H.*, for arrears of tithes in kind, due during the vicar's incumbency. The defence made was, that the vicar was never endowed, and that there was a yearly composition by way of *modus* of 17s. in lieu of all manner of tithes, which the defendant attempted to prove by receipts of former vicars, and evidence that tithes in kind were not paid within the memory of man. The plaintiff was obliged to prove the endowment, as his brother was only vicar and not rector, which he offered to do, by producing a grant, in the year 1209, by the abbot and convent of *Lyra* in *Nor-mandy* to the vicar of this parish, as evidence of endowment of all manner of tithes; but it was not suffered to be read, as it was not shewn to have come out of that monastery. The plaintiff next produced three terriers, the first of which was in 1638; the read-

(a) *Fisher v. Leaman*, *supra* 626. *Kirshaw v. Isles*, *supra* 859.(b) *Pothill v. May*, *supra* 1572.

ing of which was allowed as being evidence, though not conclusive: it never was disputed in the Exchequer; and even the parson's books have been read.

1747.

Carte

v.

Ball.

Lord Chancellor. — This is a very unusual demand. The question is, if the plaintiff has shewn an original right in the vicar to the payment of tithes in kind, and if the *modus* be a sufficient bar thereto. The *modus*, as stated by the answer, is not sufficiently laid even in point of law, nor is it sufficiently proved. The first objection thereto is, that no time of payment is shewn: that was formerly necessary, in the Exchequer; but that court has since very justly departed from that rule; however, the saying that it was to be paid yearly is too uncertain. But the principal ground of the insufficiency of the *modus* is, that it is not said by whom to be paid; which is necessary in order to shew against whom the parson has remedy for that customary payment. *Richards v. Evans*, and *Mitchel v. Neal*. (2 *Ves.* 679.) Then considering it upon the evidence, there is no proof of an entire *modus* of 17s., but only that it was paid separately and by contribution; nor do the receipts import a *modus*. But as to the plaintiff's demand, this case stands in a different light: here is no evidence of payment of tithes in kind, which is more material in the case of a vicar than of a rector, who is of common right entitled to tithes, and non-payment cannot be alleged by prescription against him; but a vicar being entitled to tithes in kind against common right, must shew an endowment either actual or by collateral evidence of such usage, of which there is none here. The usage of this parish shews there must have been some subsequent endowment; but as the original thereof cannot be read, the court must take it on the evidence produced, which does not prove that tithes in kind were ever paid, for the terriers are dark and do not import such payment; and I much question whether there is any instance of a decree for such payment where there is no evidence of it, though there might be in the case of a rector; therefore, though the *modus* is insufficient, there is sufficient in the defendant's answer to entitle him to object to the plaintiff's right, which he not having proved, he cannot have a decree; nor yet should his bill be dismissed, but some other way of relief be found. Let an issue be directed to try whether the vicar was in his life entitled to the payment of tithes in kind.

that suit the
arrears due
under such
modus.

Supra 802.

The plaintiff had time and opportunity given him to establish this ancient endowment, and to examine it by commission, which was not executed. The jury found, that the vicar in his life was not entitled to those tithes in kind; and the bill was, *July* 17th, 1749, dismissed with costs at law, but not in this court.

But *Lord Chancellor* then said, that as to the *modus* which is admitted by the answer, the plaintiff is entitled to the arrears

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thereof during his brother's life, notwithstanding the objection taken by the defendant, that the bill was barely for tithes in kind; and the plaintiff himself insisted that the *modus* was not good. An issue could not properly be directed on the *modus*, because that would be admitting some kind of endowment or other, and excluding the other point; such an issue, therefore, was directed as would take in both. It often happens, both in the ecclesiastical court and the court of Exchequer, that on the dismissing a bill brought barely for tithes in kind, the plaintiff may yet have a decree for a *modus* admitted by the defendant's answer; and it is the same in this court, since it is a good *modus* in its nature, and only imperfectly set forth in the answer, in not alleging that it was payable by the occupiers of the land, though there might be more in it if it was not good in its nature.

A. D. 1756. In Ch.

[Reg. Lib. B. 1755, fo. 93, 94. 987. 532.]

Sir *Humphrey Monoux*, Bart. and Dame *Elizabeth* his wife, late *Elizabeth Jones*, widow and executrix of *Charles Jones* deceased, v. *John Archer Shish*, and others. [MS.]

Length of time is of itself a sufficient ground to refuse an account, if the party entitled to the tithes had the legal estate, and were under no disability of infancy, coverture, &c.

*[1583]

THE bill stated, that the parish of *Waltham*, alias *Waltham Holy Cross*, in the county of *Essex*, contained four hamlets, viz. *Townside*, *Upshire*, *Holyfield*, and *Sewardstone*; and that *Charles Jones* was entitled for life to the trust of one moiety of the great and small tithes within three of the said hamlets, viz. *Townside*, *Upshire*, and *Holyfield*; and that he was possessed of the other moiety of the said tithes, under leases from *Peter Floyer*, commencing at *Michaelmas* 1728, for the term of eleven years; and that he died on the 21st of *March* 1739, without issue, leaving the plaintiff *Eliz. Monoux* his widow, and executrix of his will, which she duly proved: that the defendant *John Archer Shish*, or the other defendants, his tenants, had, from *Michaelmas* 1728, to *Michaelmas* 1739, been the occupiers of four farms within the said parish of *Waltham*, and had had therefrom several tithable matters, the tithes of which they had refused to account for either to the said *Charles Jones* in his lifetime, or to the plaintiffs since his death. The bill then suggested, that the defendant *Shish* had agreed to indemnify the other defendants, his tenants, in refusing to pay the tithes, and to take upon himself to satisfy the plaintiffs for same: that upon the death of the said *Charles Jones*, sir *Charles Wake Jones*, who was the next remainder-man in tail, commenced a suit in this court against defendant *Shish*, and his tenants, and by decree therein established his right to the tithes; and that thereupon the arrears

thereof, from *Lady-day* 1740, were paid to the said *sir C. Jones*, and that ever since, he or the persons claiming under him, had duly received some rent or composition for such tithes. The bill therefore prayed an account of all the tithes which had arisen on the said four farms, from *Michaelmas* 1728 to *Michaelmas* 1739, and that the plaintiffs might receive satisfaction for the same.

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v.
Shish.

Defendant *Shish* in his answer stated, that his father was in possession of the farms in question from 1728 to 1732, when he died; and that, from the death of his father to the year 1741, when defendant came of age, *Samuel Forster* and *Rebecca* his wife, formerly *Rebecca Shish*, as the executors of the will of defendant's father, and as defendant's guardians during his infancy, were in possession of the said farms, and received all the rents thereof, and that they never paid any part of such rents to defendant, but embezzled and applied the same to their own use, and had left the kingdom; and he insisted, that he was not liable to pay any tithes to the plaintiffs, because he was not in possession of the lands in question till after the said *Charles Jones's* death, and did not receive any rents of the said lands during any part of the time for which tithes were demanded by the bill; and he positively denied any agreement to indemnify any of the tenants in their refusal to pay tithes, or to take upon himself to pay the plaintiffs what they should appear to be entitled to; and he and the other defendants, his tenants, objected to the plaintiff's right to the tithes, and to the payment thereof, on account of the length of time since the right to the tithes arose, and the delay in suing for the same.

[1584]

Lord Commissioner *Smythe*. — This is a bill brought by lady *Monoux*, as executrix of her late husband *Charles Jones*, for tithes from *Michaelmas* 1728, to *Michaelmas* 1739. It appears, that *Charles Jones* was entitled for life, to one moiety of such tithes, and possessed of the other moiety under leases for eleven years, commencing at *Michaelmas* 1728; but no demand was set up by *Jones* for such tithes in his life, or by his executrix at his death. In 1752, *sir Charles Wake Jones* obtained a decree, establishing his right to a moiety of the tithes as next remainder-man; and directing payment of such tithes from *Michaelmas* 1739, against the said defendants, which were accordingly paid. It is clear that a right to these tithes did belong to *Mr. Jones*; and that it was a legal one also: but he never exerted it. The question then is, whether, under the circumstances of the case, the court ought to relieve the plaintiffs against the tenants. As against *Shish*, there can be no relief, for he never received the rents; there is no evidence to charge him, nor was any indemnity promised by him. The loss then must fall somewhere. Where ought it to fall? *Mr. Charles Jones* is only blameable. It is objected, that these tithes had been paid before; if so,

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Mr. *Jones* was apprized of his right. But presumption of payment cannot take place here, for it is insisted that they ought not to be paid. It is a right rule, that where a man is apprized of his right and does not assert it at that time, that he loses his right, as in the case of building on his land; and as Mr. *Jones* never asserted this right which he was apprized of, he ought to lose it. But, after the death of *Jones*, his executrix does nothing from 1739 till 1753; no demand at all during that time: length of time ought therefore to be conclusive against the plaintiffs.

Lord Commissioner *Wilmot*.—This is a clear case not to relieve. I never heard, that, except in infancy or coverture, tithes were ever carried back so far as this bill has carried them. To be sure it is often said, that the statute of limitations is no bar; but though that be so, yet it is discretionary in the court how far they will carry this claim back. If *Jones* himself, in 1739, had brought a bill for tithes from 1728, I do not think the court would have decreed it; if so, much less in the present case, where the executor of the person who deserted his right brings the bill. Mr. *Charles Jones* knew his right; he did not assert it, and therefore it is a
[1585] waiver of that right. But there are several additional reasons why the plaintiffs should not be relieved in this case; viz. there is no proof that *Shish* ever received tithes or rent for them: and if there is no reason for *Shish* to pay, much less shall the tenants pay. It was the fault of *Jones* to lie by, and suffer the tenants to pay the rent; his executrix shall not now come and demand it. Length of time operates in various ways. First, as presumption of payment. Secondly, as a reason, where a party is guilty of gross negligence, and rebuts his equity; and therefore it would be a very dangerous precedent to relieve in the present case.

P. 15 Geo. III. A.D. 1775. Scac.

Allott v. Wilkinson.

S.C.
3 Wood's
Decr. 492.
3 Bro.
P.C. 684.
(2d edit.)
In what
case an old
map of an
estate is
good evi-
dence to
ascertain
the quanti-
ties and
boundaries
of a parti-
cular es-
tate.

THE bill stated, that the plaintiff was inducted into the rectory and parish church of the consolidated parishes of *Burnham Saint Mary*, otherwise *Burnham Westgate* and *Ulph*, in the county of *Norfolk*, and thereby became entitled to the glebe lands, and the great and small tithes, and other ecclesiastical dues thereof; and also that the glebe lands belonging to the said parishes consisted of small pieces of land, lying dispersedly in the common fields, containing about one hundred acres, and had, formerly, certain metes and bounds to distinguish the same: that the defendant for several years before and since the plaintiff was inducted into the rectory and parish church, was possessed of a considerable estate in the said parishes, consisting of a great number of pieces of land, dispersed in

the said open and common fields, intermixed with, or adjoining to which, all or most of the glebe lands lay; that the defendant let out part of his lands to tenants, and kept part thereof in his own manurance, and that the defendant taking advantage of the plaintiff's predecessors, and having formerly rented such glebe lands, had gotten the same into his possession, and let some of the said glebe lands, together with his own, to several of his tenants, and kept the rest in his own hands; and that the metes and bounds being destroyed, the plaintiff was unable to distinguish which were glebe lands, to bring an ejectment for them; and that the defendant refused to pay him rent for the same, or set out such lands: and after charging several matters relating to tithes and *Easter* offerings, the bill prayed, that the defendant might pay rent for the glebe lands so in his possession from the time the plaintiff's right accrued, and deliver up to the plaintiff the possession thereof, and disclose the metes and bounds, and discover and account for the said tithes and *Easter* offerings. [1586]

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The defendant appeared, and put in his answer to the said bill, and thereby admitted, that the plaintiff was rector of the said parishes, and entitled to all the glebe lands belonging to the said rectory, and to the great and small tithes, and other ecclesiastical dues thereof.

The defendant did not know whether the glebe lands belonging to the said parishes did or did not lie dispersed in and over the open and common fields within the said parishes, or whether they did or did not contain one hundred acres, or what other number of acres, or whether they had not certain marks, metes, and boundary marks, to ascertain the same; but had seen a copy of a terrier, dated 23d *June* 1753, whereby the glebe lands were made forty-nine acres, two roods, twenty poles, lying dispersed in the fields.

The defendant admitted he was owner of an estate, and of a great many parcels of land lying dispersed in the common fields, but did not know whether the same were intermixed with, or adjoined to the glebe lands, and having purchased the said estate as aforesaid, denied that he or his tenants, to his knowledge or belief, had any of the said lands in his occupation, or that the defendant had defaced any of the land-marks, and believed the lands could not be distinguished from any other lands lying in the said fields, and did not claim title to any lands that had not been fairly and *bonâ fide* conveyed to him.

He said, that he had heard and believed that the late incumbent Mr. *Smith*, some time in the year 1761, before his death, procured a commission to be issued out of the ecclesiastical court of *Norwich*, to certain commissioners, upon a petition of the defendant and

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himself, to inquire and ascertain what were the glebe lands within the said consolidated parishes belonging to the rector thereof; but though endeavours were used, as the defendant was informed, to ascertain what were the glebe lands belonging to the said parishes, and the quantity, value, and situation thereof, yet they could not be discovered, therefore no further proceedings were had, or the commission returned.

[1587] Upon the hearing of the cause, the court of Exchequer, on the 22d May 1775, ordered that it should be referred to a trial at law in a feigned action, to be for that purpose brought in the office of pleas of the said court, upon the following issue; (to wit,)

“ Whether the defendant, by himself or his tenants, was in possession of ninety acres of glebe lands belonging to the plaintiff as rector of the consolidated parishes of *Burnham Saint Mary*, otherwise *Burnham Westgate* and *Ulph*, in the county of *Norfolk* ;” and if the jury should find, that any more or less than ninety acres of glebe land were in the possession of the defendant or his tenants, that the same should be indorsed on the *postea*, and that all books, papers, and writings, in the custody of either of the said parties, should be produced at the trial.

The issue was tried at the summer assizes, 1776, for the county of *Norfolk*, before Mr. Serjeant *Sayer*, by a special jury, when several matters were given in evidence for the plaintiff, and particularly a terrier of 5th June 1706, signed by the rector, the two churchwardens, and some others of the inhabitants, which was objected to by the defendant's counsel, as neither the owner nor occupier of the lands, now in the estate of the defendant, had signed the same; but the judge was of opinion, that as the terrier was signed by the churchwardens and other inhabitants, that it was good evidence: the said terrier contained sixty-three acres of land abutted, and twenty acres in certain lands called the *Brecks* and *Fould Courses*, not abutted.

The next evidence produced by the plaintiff was a map, intituled, “ An exact description of the parishes of *Burnham Westgate* and *Burnham Norton*, in the county of *Norfolk*, setting forth their joint and several lines of perambulation, with all parcels of land, as they were then divided, lying within the said parish of *Burnham Westgate*, and part of the parcels of land lying within the said parish of *Burnham Norton* ; also some parcels of land lying in the adjacent parishes, surveyed, measured, and delineated, at the appointment of *Thomas Soame*, esq., lord of the lordships and manors of *Reynham*, alias *Lexhams*, alias *Burnham Lexhams*, and *Polstead Hall*, lying within the said parishes, *A. D.* 1648, per *John Kersey* philomath.” This map was produced by the defendant, in obedience to the order of the court of Exchequer.

The defendant's counsel objected to the map being admitted as evidence; but the judge, not thinking it necessary to decide whether the map was strict legal evidence or not, declared his opinion, that as by the order of the court of Exchequer (which was a court of equity, and therefore allowed a greater (a) latitude of evidence) the defendant was directed to produce at the trial, maps, field books, and papers, and had produced that map, it was admissible.

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[1588]

In the said map, the glebe lands of the rector of *Burnham Westgate* were marked with the letter (M), those of the rector of *Burnham Norton* with the letter (N), and those of the rector of *Burnham Ulph* with the letter (O), but the quantity of such piece was not expressed.

John Willock, a land surveyor, a witness for the plaintiff, deposed, that, upon measuring the lands marked M. N. and O. in the map, by a scale, he found the quantity of the lands abuttaled sixty-four acres and thirty-four poles, and the quantity of lands not abuttaled, twenty acres and twenty-six poles.

John Huggins, another witness for the plaintiff, deposed, that he knew all the pieces so made up by the terrier, the map, and the surveyor, and proved the possession of these lands in the defendant or his tenants; the contents of each piece were taken down, not from the terrier, but from *Willock's* admeasurement; and it appeared in many instances, upon comparisons, that the contents in the terrier did not agree with his admeasurement, and that several pieces of land were marked M. N. and O. in the map, which were not mentioned in the terrier: so that the evidence of the terrier, the map, and the surveyor, contradicted each other.

Edward Merremint, another witness for the plaintiff, and *Huggins*, the former witness, swore, that *Mier Balks* had been ploughed up by the defendant's orders.

On the part of the defendant, two old terriers were produced; one of the year 1709, containing fifty acres, two roods, twenty poles; the other of the year 1716, containing forty-seven acres, one rood, twenty poles; and were both signed by the rector of the consolidated parishes of *Burnham St. Mary*, otherwise *Burnham Westgate* and *Ulph*, for the time being: and there are ten other succeeding terriers, none of which exceed fifty acres, and differ from each other only in small quantities. [1589]

(a) I always understood, that courts of equity held themselves strictly bound to adhere to the rules of law, as to evidence; and that their order for the production of books, papers, &c. on a trial at law, did not prevent their being rejected as evidence, because such order is of course, and

only directs the mere production of them; for otherwise deeds ordered to be produced must be received as evidence, though unstamped or forged. J. R. This observation of Mr. Rayner's seems just.

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The defendant's witnesses also contradicted the evidence which was produced on the part of the plaintiff to show that the defendant had given orders to plough up the *Mier Balks*, and in a particular instance the evidence of *Huggins* was invalidated: *Huggins* swore to the ploughing up *Mier Balks*, belonging to the glebe lands, by the order of the defendant's steward, *Henry Spooner*; and that he first objected thereto, but afterwards, by *Spooner's* orders, ploughed up the same with tears in his eyes: this was flatly denied by *Spooner*, who positively swore he never gave such orders.

Mr. *Solomon Tell*, a witness for the defendant, produced a grant in 4 *Eliz.*, whereby *Richard Bunting* granted to *Edmund Bamell*, the master, and the scholars of *Christ Church, Cambridge*, a moiety of the rectory of *Burnham*, otherwise *Burnham Saint Mary*, otherwise *Burnham Westgate*, with the appurtenances in *Burnham Saint Mary, Norfolk*, and all the glebe lands, and a moiety of all the tithes thereof, and proved, that the master and scholars were pursuing their claim against the defendant; but the judge declared, that on the present issue no regard ought to be had to this grant, and gave directions to the jury, that if any glebe land belonged to the rectory in 1716, the plaintiff was entitled to it, though neither he nor his predecessors were in possession of it; that the difference of the terriers was immaterial; that if the jury were not satisfied with the exact quantity, yet as some glebe land had been proved to belong to the rector, they were to settle the quantity; that if they believed the defendant had ordered the *Mier Balks* to be ploughed up, and that the quantity could not be proved, it should be taken most strongly against the defendant; that if the defendant, or his tenants, were in possession of any of the lands of which the *Mier Balks* had been ploughed up, the jury should settle the quantity of those lands.

The jury went out, and soon afterwards returned, and asked the judge how many acres the associate had taken down, and he told them eighty-four, whereupon they brought in a verdict for eighty-four acres.

[1590] The defendant being dissatisfied with the verdict, in that it found so large a quantity of land as eighty-four acres to be in the possession of the defendant, or his tenants, upon insufficient evidence, and under the misdirections of the judge, moved the court of Exchequer, that a new trial might be granted of the issue directed by the said decree; and an order was obtained for the plaintiff to shew cause, why a new trial should not be granted.

Upon Mr. Baron *Perryn's* reading Mr. Serjeant *Sayer's* report of the evidence given on the trial, and on hearing counsel on be-

half of the plaintiff, shewing cause against the last-mentioned order, and reading the same, and also on hearing counsel on behalf of the defendant; it was ordered, that the cause shewn against the said order should be, and was thereby allowed, and that no new trial should be granted.

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The defendant, in *Easter Term* 1777, appealed from the said order to the House of Lords, for the following (among other) reasons :

1. The maxim of *nullum tempus occurrit ecclesiæ*, of which the respondent can avail himself, applies no further, than that a statute of limitations cannot be actually pleaded in bar to the rights of the church; but that the maxim diminishes not the right of the party adverse to the claims of the church, which is deduced from the length and operations of time; and as the appellant, and those from whom he claims, have had immemorial and uninterrupted seisin of most part of the lands comprised in the verdict till the year 1772, when the respondent forcibly took possession of twenty-nine acres, which have been since recovered by an ejectment brought by the appellant, a court of justice will so far protect a title purchased for a valuable consideration, and guarded by length of time, as not to have it totally defeated by one trial at law, and by a claim founded in presumption, and not positive proof.

2. The verdict is erroneous, because it comprehends lands belonging to the parish of *Burnham Norton*, and the issue is confined to the consolidated parishes of *Burnham Westgate*, and *Ulph*.

3. The admitting maps as competent evidence in all the cases, where they shall be found in the possession of the person against whom they shall be produced, unaccompanied by any evidence of the occasions or purposes for which the same were made, cannot but be highly dangerous to the property of every landholder in the kingdom; but more so, when such maps shall appear to have been, for a considerable space of time, in the hands of a person claiming under an adverse title. In the present case, notwithstanding several objections were made both to the competence and credit of the map made in 1648, the judge was pleased to give no weight to any of them, but to pass them all over, because, as he informed the jury, all maps, as well as other written evidence, had been ordered by the court of Exchequer, which was a court of equity, to be produced at the time of the trial; whereas it is a well known rule of law, that such order is never construed or understood to extend to give either competence or credit to any map or instrument which would not have been entitled to competence or credit without such order, as evidence to be admitted in a court of law; and it is remarkable, that in the present case the witnesses examined at the time of the trial, the map and the terrier, contradict one another.

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4. Supposing the map to be free from all objection, and even to have been conclusive evidence, yet the contents thereof do not warrant the verdict found; for as the measures of the several pieces of land are not marked upon them, this circumstance does not only render the map more liable to alteration by the interpolation of a line or letter, but makes it necessary to supply the quantity from other evidence. It has been attempted to effect this by the testimony of *John Willock* the surveyor, who swears, that he measured the several pieces marked M. N. and O. by a scale on the map; but there is a palpable absurdity in *Willock's* evidence that deprives it of all credit. He swears that the abutted lands measure sixty-four acres and thirty-four poles, and the unabutted lands twenty acres and twenty-six poles, which last (if any such there are) it is obvious he could not possibly measure with a scale.

5. It appears that the surveyor measured all the lands marked M. N. and O., and that the associate took down the particulars and amount of all those pieces: the judge referred the jury to what the associate had taken down, and the verdict of the jury was manifestly directed by the associate's account; yet letter (N) appears by the map to denote lands belonging to the rectory of *Burnham Norton*, to which the issue does not extend.

6. The defect in the proof of quantity is not cured by the terrier of 1706, where the quantities are expressed, not in words, but in figures only, because that terrier is not signed by the owner or occupier of the lands which belong to the appellant, and is contradicted by two subsequent terriers, signed by the predecessor of the respondent, rector of the consolidated parishes of *Burnham Westgate* with *Ulpsh.*

7. That if a new trial should be granted, the respondent may still have an opportunity of making out the quantity of the glebe land he is entitled to; but if such trial should be refused, the appellant
[1592] and his heirs will be bound by the last verdict, and can never have any redress.

Objections to the competency and credit of the map on which the respondent's right is founded to the glebe lands in question, humbly submitted on the part of the appellants.

1. The map having been delivered to the predecessor of the respondent, and in his possession, it is totally deprived of its original validity, as applied to the right of the appellant, more especially when rasures and alterations evidently appear to have been made upon it, in many places, and in particular upon the pieces which relate to the glebe.

2. No acquiescence in the descriptions of the map has ever been shewn by any person whose property this map is said to describe,

to denote the accuracy, or prove the authenticity of it; nor is it signed by any of the persons whose rights are affected by it, though it is made to describe whole parishes, and the possessions of different proprietors.

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3. The specific quantity each piece contains is not marked, nor is there any account of what quantity of lands in general is belonging to such proprietor, but from the letters of reference, which are liable to interpolation, as is the quantity of each piece to augmentation by erasures, or diminution by the insertion of a line. The quantities contained in each piece, by admeasurement from a scale, must be extremely uncertain, and must depend upon an accuracy in the delineation which scarcely any map will admit of, and least of all a map, which, notwithstanding the declaration of *Willock* the surveyor, has, on the face of it, the most palpable marks of negligence and inaccuracy; there are several pieces described on the map, to which even at this time no letter is affixed, and there is one piece on which ten different letters are annexed, referring to different parishes.

4. The map was in the possession of the respondent's agents for a considerable time; copies were clandestinely taken of it without any application to the court of Exchequer, and the pretended survey made in the same clandestine manner, without the knowledge of the appellant. The appellant, therefore, humbly hoped, that a new trial would be granted.

Respondent's Case.

[1593]

On the other hand, the respondent insisted that the verdict would be found to be well warranted by, and the clear result of, the evidence.

OBJECTIONS.

The objections to it, as stated at the time of the motion for a new trial, were,

First, That the map and terrier produced were in evidence inadmissible, being of a private nature, and under control of those whose interest may be affected by them.

Secondly, That the inquiry at the trial was extended to the parish of *Norton* as well as the parishes of *Westgate* and *Ulph*, whereas the latter only were mentioned in the issue.

Thirdly, That upon the evidence it did not appear, that the respondent had any seisin of the glebe in question.

ANSWERS.

The objection to the map appeared to be rather extraordinary, as it was made under the directions of the lord of the manor for the time being, was produced by the appellant, the present lord of the

1775.

Allott
v.
Wilkinson.

manor, and seems therefore to be evidence perfectly unexceptionable as against him. The terrier was authenticated by the signature of the rector, the parish officers, and other considerable inhabitants of the parish, and was produced from the bishop's registry, the proper repository for such instruments. In questions of this sort, it is apprehended, terriers are always received in evidence; and in this instance the terrier and the map, by their coincidence, derive additional credit from each other.

The parishes, though originally three, have long been and are now consolidated, and therefore more properly one, which is familiarly known in the county by the name of *Burnham*; the respondent holds them all by one and the same title, and the question in the court of Exchequer was, whether the title supported his claim to the lands in question, so that *Norton* was substantially, though not literally, within the terms of the issue.

[1594] As to the objection for want of seisin: if that objection means, that the respondent personally had not possession, it is the very grievance he complains of; but if it appears, as it is submitted it does, satisfactory from the evidence, that his predecessors were in possession in 1706, the date of the terrier, or even in 1648, the date of the map, though that possession has been injuriously taken and withheld from him, it is apprehended, that there is sufficient evidence of seisin, as far as seisin is necessary for such a claim; in fact, the respondent is still in possession of what his neighbours have thought fit to leave of the glebe. (a)

May 13,
A.D. 1777.

Ordered and adjudged, that the appeal be dismissed, and that the order therein complained of be affirmed; and it is further ordered, that the appellant do pay to the respondent one hundred and fifty pounds costs.

A.D. 1785 (b). In Ch.

Byron, Clerk, v. Lamb. [MS.]

What is
barren land
within the
statute of
2 & 3 E. 6.

THIS was a bill (*inter alia*) by the plaintiff, as rector of the parish of *Ryton* in the county of *Durham*, against the defendant, as occupier, during the years 1774, 1775, and 1776, of a certain close or parcel of ground called *Howburn Bog*, otherwise *Howburn Banks*, situated in the said parish of *Ryton*, containing about five acres, for an account of the tithes of oats and turnips.

The defendant put in his answer; and the defence therein set up by him was, that the said parcel of ground called *Howburn Bog*,

(a) See also *Earl v. Lewis*, 5 Esp. N.P. 1.

(b) I have not ascertained the exact year in which this cause was determined, but it was certainly prior to the case of *Jones v. Le David* (*supra* 1336.), which was in 1791, for the learned judge alludes to it in his judgement in that case.

I take it for granted, therefore, it was somewhere in this decade; and have, as Sir *Henry Spelman* was used to do in such a case, taken the middle year. (The register's book has been searched ineffectually for this case. *Ed.*)

or the greatest part thereof, was, previous to the year 1774, barren or waste ground, and that in that year he began to drain and improve the same, and that it had never before paid any tithes; and that by virtue of the stat. of 2 & 3 Ed. 6. c. 13. the same is privileged and exempt from the payment of all manner of tithes during the first seven years after the improvement thereof; and that the plaintiff was not therefore entitled to the account demanded by his bill.

1785.

Byron
v.
Lamb.

The evidence produced by the plaintiff proved, that the whole of [1595] the said parcel of ground called *Howburn Bog* was in tillage many years ago, except two acres, which were never in tillage till 1774, but which were, nevertheless, always considered as liable to pay tithes; and that the other part that was in tillage had paid, or was liable to pay tithes, and that plaintiff had for seven years past either taken the tithes thereof in kind, or let them; and particularly, that plaintiff had let the tithes of potatoes in 1774, and of rye in 1775, produced from a part of *Howburn Bogs*, to *Joseph Robjon*, who received the tithes; and that the two acres first converted into tillage in 1774 had produced a bad crop of rye, but had received only the common mode of culture. And it was also proved, that one acre of the *Howburn Bog* had been converted into tillage about forty-four years ago, and that it had produced one or two crops of corn, and that tithes had been paid for the same to the rector; but whether *Howburn Bog* had been in grass or in tillage for the last twenty-eight years could not be proved.

The evidence produced by the defendant proved, that for many years past the hollow or flat part of the said parcel of ground called *Howburn Bog* otherwise *Howburn Banks*, containing about three acres, was boggy and grew little but rushes, and that three several pieces of the uneven or banky part thereof, containing about two acres, was of little or no value, and grew little but briars, and that both parts were, in the years 1774 and 1775, in a very barren and unprofitable state, and incapable of producing a good crop without a very extraordinary expence in stubbing one part, in making drains in another part thereof, and in ploughing, liming, and manuring the whole, and that the hollow or flat part of *Howburn Bog* was, in the year 1774, so boggy, wet, and deep, that no cattle could go upon it without great danger of being lost; and that when it was drained, and ploughed, and sown, the same could not be harrowed by horses or cattle; and that they were obliged to harrow the same by men; and that the uneven or banky part was not in the year 1774 capable of being plowed without its being first dug; and that all the crops which the said *Howburn Bog* had produced during the years 1774, 1775, and 1776, were so mean and bad, and the profits arising from the cultivation thereof had fallen

1785.

Byron
v.
Lamb.
*[1596]

so much short of the sums expended thereon, that it would not be possible for the defendant to be reimbursed the same in the space of twenty years. And it was also *proved, that the defendant must have spent at least forty pounds in improving the said ground, and that he had paid tithes for such part of the *Howburn Bog* as had been formerly in tillage, and required no extraordinary expence in cultivation.

The cause came on to be heard before *Eyre* Baron, sitting for the Chancellor, and after argument the learned judge said,

The statute as to barren land is much mistaken: the narrow construction it has received is improperly imputed to the judges; it should be imputed to the law. The plaintiff here has no case: no cattle could tread, no plough could go. This ground was reclaimed in the rage of improvement. It is in evidence the defendant could not harrow with horses. What can be barren, if this is not barren? Sun and air will give fertility. The court, indeed, will not put a premium on ill husbandry. *Howburn Bog* is barren.

Supra 823.

In *Stockwell* and *Terry* the land produced two crops without manure. — The bill was therefore dismissed as to *Howburn Bog* with costs. (a)

P. 28 Geo. III. A. D. 1788. Scac.

Earl of *Coventry*, *John Cooper*, *Edward Bearcroft*, *William Barnes*, and *William Harward*, v. *William Burslem*, Clerk, *Henry Cecil*, *Emma* his wife, *Thomas Vernon*, and *Richard* Bishop of *Worcester*. [Eyre's MS.]

S. C.
4 Wood's
Decr. 343.
2 Anstr.
567.
It seems
that a bill
to establish
moduses
cannot be
supported
where there
has been no
attempt to
enforce the
payment of
tithes in
kind. The
only bill
which the
occupier
can main-
tain in such
a case is a
bill to per-
petuate tes-
timony.

THIS was a bill by lord *Coventry* and *Bearcroft*, as owners, and by the other plaintiffs, as occupiers of certain lands in the parish of *Hanbury* in the county of *Worcester*, against the rector, the patrons of the living, and the ordinary, to establish several *moduses*. The bill merely stated a tender of the *moduses*, and a refusal by the rector to accept them. The rector by his answer denied the *moduses*; acknowledged his refusal to accept them; denied that he had threatened to institute a suit to enforce the payment of tithes in kind; but admitted that he intended to file a bill for that purpose.

Upon the opening a doubt arose, whether, where there had been no attempt to compel the payment of tithes in kind, a bill to establish *moduses* would lie.

On the part of the plaintiffs it was argued, that this was a bill of peace; that it was to quiet possession and establish rights: that though while the payment was acquiesced in it was not likely that a suit of this kind should be instituted, yet there were instances of

(a) See *Sherington v. Fleetwood*, supra 189., where the cases are collected.

bills being filed in such cases; that in *Rowe v. Bishop of Exeter*(a), 22d July 1719, there was a decree to establish *modus*, though the allegation in the bill was simply a refusal to accept them. The prayer of the bill in that case was, to examine ancient witnesses, and establish *modus*; the rector denied the *modus*, and then filed a cross bill for an account of tithes; the court offered him an issue to try the *modus*, which he refusing, the *modus* were established: that there being a decree in that case on both bills, the original bill must have carried equity in itself; that a cross bill may be supported by the equity of the original bill, but not *vice versa*: that in *Wollacombe v. May*(b), 30th June 1783, there was a like bill; issues were directed, which were afterwards taken *pro confessis*, and the *modus* were established: so *Offley v. Fansham*, 29th November 1749, and *Anderton v. Davies*, at the Rolls.

1788.

*Earl of
Coventry
v.
Burslem.*

Supra 822.
Supra 1268.

On the other side it was said, that the proper equity in this case was merely to establish testimony: that in *Wake v. Conyers*(c), before Lord Keeper Henley, 16th June 1759, the bill was allowed only to perpetuate testimony: so *Mostyn v. Egerton*, and *Welby v. Duke of Rutland*, 6 Br. P. C. 575., that where no act had been done the rector could not be compelled either to abandon a dormant claim, or to litigate it: that as to the tender, the court would not force the defendant to accept the money: that there was nothing in this case *ex debito justitiæ*, but the examination of witnesses: that as a bill *quia timet*, mere apprehension of a suit was not a ground to support it.

By consent the bill was amended, and made a bill merely to perpetuate the testimony of the witnesses to prove the several *modus*. (d)

When this cause first came on, the ordinary was not a party to the suit; and it was said, that in *Carr v. Henton**, it had been holden, that the ordinary was a necessary party. But the court said, that that case was not to be so taken: they stated how *Carr v. Henton* stood; and that they did not mean to be now understood to say that he was a necessary party. However, it was thought prudent to make the ordinary a party; and for that purpose the present bill was amended. (e)

Qu. Whether the ordinary, though not patron, should not be a party to a bill to establish *modus*.
* Supra 1258.

(a) 2 Wood's Decr. 136.

(b) 4 Wood's Decr. 249.

(c) 1 Eden 831.

(d) See *Howell v. Frankis*, supra 1348. *Gordon v. Simpkinson*, 11 Ves. 509. *infra*.

(e) *Gordon v. Simpkinson*, 11 Ves. 509. *infra*.
De Whelpdale v. Milburn, 5 Pri. 485. *infra*.
Hales v. Pomfret, 1 Dan. 142.

1790.

M. 30 Geo. III. A.D. 1790. Scac.

Etherington
v.*Hunt.*

S. C.

4 Wood's

Decr. 368.

A custom
that the oc-
cupiers of
ancientmessuages
in the pa-
rishes of*Thorn,**Fishlake,*

or any

other pa-

rish lying

within the

manor of

Hatfield,

shall pay

the tithes

arising

from *North**Thorn**Common,*

and other

waste lands

appurte-

nant to

their said

messuages,

to the rec-

tor or vicar

of the pa-

rish in

which the

ancient

messuage

is situated,

and not to

the rector

or vicar of

the parish

in which the

right of

common

was enjoy-

ed, is good.

Sir Henry Etherington v. William Hunt and John Howorth.

THE bill prayed an account of small tithes from 25th *March* 1783, stating plaintiff to have been the purchaser of the rectory impropriate of *Thorn* in the county of *York*, 7th *May* 1783, and thereby entitled to all tithes, great and small, accruing from the 25th of *March* preceding; that defendants depastured barren and unprofitable cattle on lands within the rectory, and particularly on a common called the *North Common*, but refused to pay any agistment tithe.

The answer stated a belief that the manor of *Hatfield* comprises the whole of the parishes of *Fishlake*, and of *Thorn*, and of *Hatfield*, and of other parishes; and that immemorially, until the 2 *Car. 1.*, there were in all or most of the parishes within the said manor of *Hatfield*, and particularly within the parishes of *Fishlake* and *Thorn*, commons or waste lands of large extent, part of the said manor, and particularly a parcel in *Thorn*, thentofore called *Ditchmarsh Common*, and since and now the *Far Common*, which the defendants believed to be the same which the plaintiff means by the description of *Thorn North Common*; and they alleged a custom from time immemorial until the 2 *Car. 1.*, that all occupiers of ancient messuages, cottages, or frontsheds, situate within any part of the said manor, without any regard as to the parish in which the messuages, &c. were respectively situate, were entitled in right of, and as appurtenant to them, at all times of the year, to depasture their commonable cattle on any of the commons or waste grounds, part of the said manor, without regard to the parish in which they lay: that *Car. 1.* was before the second of his reign seised in fee of the manor, and all the wastes and commons thereto belonging; and that great part of the commons was subject to be drowned, and that by articles of 2 *Car. 1.* he agreed, that in consideration of *Cornelius Vermeuden's* undertaking to drain and fit them for tillage, &c. *Vermeuden* should enjoy one-third of all the said then drowned ground, to be granted to him in fee, &c.: that the defendants believed that *Vermeuden* drained accordingly: that *Car. 1.* conveyed one-third to him, and issued a commission to agree with the inhabitants of all the townships, &c. in and adjoining to the said wastes, who claimed common in the same concerning their right of common, and that the commissioners agreed with the greatest part, and allotted to them several parcels of ground: that *Vermeuden* afterwards purchased the manor of *Car. 1.* and residue of the wastes; and that afterwards, on a controversy between *Vermeuden* and his assigns on the one part, and the inhabitants of the manor, and particularly of the towns of *Hatfield*, *Duns-*

cross, Woodhouse, Tadworth, Thorn, Sikehouse, Fishlake, and Stainforth, on the other part, and on reference by the privy council to Viscount *Wentworth*, Lord *Darcy*, and Mr. *J. Hutton*, they, 6th September 1630, made an award, which was afterwards settled by compromise, which decided, that the tenants of the manor and members thereof should have their allotments originally set out by the commissioners in lieu of common, with 200 acres more in *Ditchmarsh*, and 403 acres in *Farnecarr*; and that all such allotments should be drained, and should be set out so as to lie conveniently for *Sikehouse* and *Fishlake*, as well as for *Thorn*: that this award and compromise were afterwards confirmed by a decree in the Exchequer: that all occupiers of all ancient messuages, &c. situate within any part of the manor, without distinction as to parish, &c. where situate, have constantly since then depastured on such commons, &c. without regard to the parish wherein such commons were situate: that immemorially the occupiers of all ancient messuages, &c. within the said manor in each parish have used to pay for the tithes of all tithable matters arising to them in respect of such ancient messuages, &c. and all the lands thereto respectively belonging, or in respect of the waste lands or commons whereon they had a right of common before and till the 2 *Car.* 1., or in respect of all or any of the waste lands, commons, or other grounds, which were allotted to such occupiers before or in 1630, in lieu of such rights of common, to the rector of the parish wherein such ancient messuages, &c. are situate, whether the waste or other lands in respect whereof such tithable matters arose are situate in the said parish with such respective ancient messuages, &c. or not, and notwithstanding any of the waste or other lands in respect whereof such tithable matters arose are in any parish different from that in which such ancient messuages, &c. are respectively situate; and that no occupier of any ancient messuage within the manor ever within the memory of man paid to any person other than the rector of the parish in which such ancient messuages, &c. are situate, in respect of the tithes of any tithable matters arising in respect of any lands belonging to any such ancient messuages, &c., or any of the waste lands or commons whereon such occupiers had right of common before the second of *Car.* 1., or in respect of any other lands allotted to such occupiers before or in 1630, in lieu of such right of common, even though any part of the waste or common, or other lands in respect whereof such tithable matters arose, were situate in any parish different from that in which such ancient messuages, &c. were respectively situate: they admitted the occupation of ancient messuages situate within the rectory of *Fishlake* and manor of *Hatfield*; and insisted, that as occupiers thereof they were and had been, by virtue of the said custom or prescription, and award,

1790.

Etherington
v.
Hunt.

[1600]

1790. agreement, decree, and feoffment, entitled with the occupiers of
Etherington ancient messuages, &c. to the use of the common or ground allotted
 v. for their use in lieu of the said prescriptive rights of common; that
Hunt. they had enjoyed it; and that a small part only of the allotments
 lie within *Fishlake*, and that *Ditchmead* (one moiety whereof, and
 200 acres more were so allotted) lies entirely within *Thorn*: that
 in pursuance of the award the moiety and 200 acres of *Ditchmead*
 were set out so as to lie convenient for *Sikehouse* and *Fishlake*, both
 within the parish of *Ditchmarsh*, as well as for *Thorn*: they ad-
 mitted depasturing horses, sheep, and lambs on *Ditchmarsh*, in the
 hill called *North Common*; but the sheep were shorn in *Fishlake*,
 and the lambs yeaned in that parish, so that no tithe was due for
 the agistment of them, and none paid: they admitted the plain-
 tiff to be purchaser of the rectory, but referred to the conveyance,
 and believed him entitled to all tithes, great and small, as former
 impropriators, and particularly to the tithes arising from the tithable
 matters which any occupiers of any ancient messuages, &c. situated
 within the said parish have had on the said common called *North*
Common, &c., but that he was not entitled to any tithes arising from
 tithable matters which any occupiers of ancient messuages, &c.
 in *Fishlake* have had on the same: that they had not occupied
 any lands in *Thorn*, other than the commons so allotted as before-
 mentioned, nor depastured on any other lands in *Thorn*; and
 though they had depastured on *North Common* sheep, &c. not shorn
 in *Thorn*, yet no tithe was due, for the reasons aforesaid: that the
 said dean and chapter of *Durham* are the impropriate rectors of
Fishlake, and *Gadesby* their lessee; and they claimed all tithes due
 for all cattle belonging to the inhabitants of *Fishlake*, who in right
 of ancient messuages, &c. there depasture on *Thorn North Com-*
 [1601] *mon*: they admitted non-payment of tithes, and general demand of
 satisfaction by the plaintiff, and their refusal, but not on account of
 any exemption, other than as aforesaid: they insisted the dean and
 chapter of *Durham*, and their lessees, ought to be parties.

In *Hil.* 26 *G.* 3. a bill of interpleader was filed, wherein *Hunt*
 and *Howorth* were the plaintiffs, and *Etherington* and *Gadesby*, and
 the dean and chapter of *Durham*, were defendants; and the prayer
 of the bill was, that the defendants might interplead and ascertain
 their rights, that issues might be directed, if necessary; and an in-
 junction might issue in the mean time, upon payment into court
 by *Hunt* of 1*l.* 14*s.* 3*d.*, and by *Howorth* of 1*l.* 7*s.* 9*d.*; and stating,
 as in the answer, the manor of *Hatfield* to comprehend several
 parishes, with large commons; the custom; the inclosure by *Ver-*
meuden: that *Etherington* was impropriator of the parish of *Hatfield*,
 and of *Thorne*, if *Thorne* was a parish; and claimed tithe agistment
 for *North Common*.

Etherington, by his answer, said, he knew not the custom alleged ; knew not, yet admitted the grants by C. 1. to *Vermeuden*, &c. ; admitted he was impropriator of the parish of *Thorn*, and claimed all tithes accruing from *North Common* since the 7th of May 1783, particularly agistment tithe: he also admitted his suit.

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Etherington
v.
Hunt.

The answer of *Gadesby*, and of the dean and chapter, admitted *Etherington* to be impropriator of the parish of *Thorn*, and that *North Common* was within that parish, but relied on the custom.

N. B. H. T. 1791, 28th of *January*. The court seeming to be of opinion, that the cross bill was not good as a bill of interpleader, and that the evidence on that bill, being between different parties, could not be read against the plaintiff in the original bill, there was a decree by consent, that the evidence in the second cause should be read on the first, and so at the trial, if any of the witnesses were dead, saving just exceptions to competency ; that the plaintiffs in the second cause should pay the costs of that bill to the plaintiffs in the first, and that an issue should be directed to try the custom as alleged in the answer to the first bill.

The custom was found as stated ; and upon the return of the *postea*, the bill was dismissed ; each party to abide by his own costs at law and in equity.

4 Wood's
Decr. 372.

H. 31 Geo. III. A. D. 1791. Scac.

[1602]

John Bromfield Ferrars, clerk, rector of *Beddington*, v. *William Pellatt*, and others: And

The said *William Pellatt*, esq. devisee in trust, named in the will of Sir *Richard Hackett Carew*, bart. deceased, and others, *George Carew*, esq., *John Fountayne*, D. D., plaintiffs, v. the said *John Bromfield Ferrars*, clerk. [Eyre's MSS.]

LORD C. B. Eyre. — The original bill was brought by plaintiff *Ferrars*, rector of *Beddington*, in the county of *Surry*, praying an account and payment of the tithes of oats subtracted by the defendants *Pellatt*, *Smith*, *Long*, *Hilbert*, *Bristow*, and *Durand*, (occupiers of lands within the said parish of *Beddington*), and for an account of tithes in general, subtracted by the defendants *Blake* and *Cheriton*, occupiers also of lands within the said parish ; and that the defendant *Pellatt* might account and pay the value of the tithes of oats taken and carried away by him from lands within the said parish, in the occupation of any other person.

S. C.
4 Wood's
Decr. 334.
In ques-
tions be-
tween a
rector and
portionist,
touching
the extent
of their re-
spective
rights, the
rector is
entitled to
stand upon
his common
law right,
and to
throw the
onus pro-
bandi upon
the portion-

This cause came on to be heard in *Trinity* term, 26 Geo. 3. upon the original bill only ; when it appearing, upon the opening of the case for the defendants, that the rectors of *Beddington* had been in possession of a portion of tithes, in *Beddington*, which had been demised to them by the *Carew* family, and that in order to come at

1791.

Ferrars

v.

Pellatt.

ist, though the rectors have for a long series of years been in possession of the portion as lessees thereof, and so founded the boundaries.

[1603]

the real justice of the case between the complainant and the defendants, it would be proper to ascertain, if possible, what the portion consisted of, the cause was ordered to stand over, and a cross bill was directed to be filed by the first day of the then next term, the defendants undertaking to dismiss their bill which they had filed in the court of Chancery. The costs and the causes were directed to come on together. A cross bill was accordingly filed; and the cross bill prays, that defendant *Ferrars*, rector of *Beddington*, may account with plaintiff *Pellatt*, as devisee in trust in the will of the said Sir *Richard Hackett Carew* deceased, for the rent of 2*l.* 3*s.* 4*d.* *per annum*; also for the tithe-straw, both of wheat and rye, within the said parish, and for seven quarters of wheat, four quarters of rye, and thirty quarters of barley, since he became rector of the said parish; and may permit *Pellatt* to receive the tithe of oats within the said parish, and account for all the tithe-oats received by him, *Ferrars*: that *Pellatt* may have the benefit of the agreements which have subsisted between the *Carew* family and the successive rectors of *Beddington* since the lease from Sir *Francis Carew* to *Richard Woorde*, and that proper leases may be executed for such purposes, or that defendant *Ferrars* may be decreed quietly to deliver up possession of the said portionary to plaintiff *Pellatt*, and account for the profits thereof accrued since his possession thereof, the plaintiff *Pellatt* accounting in like manner for the tithes belonging to the said rectory possessed by him; and that the nature and extent of the said portionary may be ascertained by the decree of the court, and that a commission may issue for that purpose, if necessary: that an injunction may issue to restrain the rector, his agents, &c. from felling or cutting any more of the timber, walnut, or other trees growing on the lands belonging to the said portionary, and particularly on the lands called *Sharpes*, or from committing any further waste on the said lands, and also from receiving any more of the tithe of oats within the parish.

The causes came on to be heard together in *Trinity* term, 27 *Geo.* 3., when, upon opening the case of the plaintiffs, in the cross cause, the causes were again ordered to stand over, with a view to a compromise, which was recommended to the parties by the court. The compromise did not take effect, and in *Hilary* term, 28 *Geo.* 3. the causes were again brought on, when it was proposed on the part of the defendants in the original cause, and the plaintiffs in the cross cause, that a commission should issue to ascertain what the portion of *Beddington* consisted of, and in whose possession the particulars of the portionary then were; and this not being opposed by the plaintiff, by the decree made in these causes on 29th *January* 1788, it was ordered, that a commission should issue to inquire into and ascertain, and distinguish by pro-

per descriptions, of what the portionary of *Beddington* consists, and in whose possession, the particulars which the commissioners should find to be parcel of such portionary then were; and that the commissioners, or any two of them, should return a certificate of what they should do. A commission was accordingly issued, and the certificate of the commissioners was returned.

1791.

Ferrars
 v.
Pellatt.

The causes were set down at the sittings after *Hilary* term, 29th of the present king, to be further heard on the return of the commissioners, when it appearing that the evidence was not returned, and there being no direction in the decree to return the evidence, and it being at that time conceived that it would be necessary to [1604] rehear the causes in order to rectify this mistake, the causes stood over to be reheard. In the *Easter* term following, they were brought on to be reheard, when it was objected, that no petition had been presented for a rehearing, and the causes again stood over. On the 22d of *June* 1789, these causes came on to be reheard on the plaintiff's petition, when it was ordered that they should stand over to the sitting after term, and in the mean time the commissioners should return the evidence, and proofs taken by them on the commission, and should annex such evidence and proofs to the commission, and certificate returned by them. In obedience to this last order, the commissioners made their return, and certified the evidence which they had taken.

The causes were brought on in *Michaelmas* term, the 30th of the king, after the evidence had been returned, when several objections were taken to the return by *Mr. Partridge* on the part of the defendants in the original cause, and plaintiffs in the cross cause, which were argued at large by the counsel on both sides, and the causes again stood over. They were brought on again in the *Easter* term following, when it was ordered, that the return should be confirmed, and the causes were directed to be heard for further directions upon the whole case, and in the same term *Mr. Partridge* was heard for the defendants in the original cause, and the plaintiffs in the cross cause. It was then proposed that these causes should be compromised by an agreement to the following effect: that the rector should remain in possession of the house and lands now in his occupation, which by the return are ascertained as parcel of the portionary, and should waive all claim to tithes arising within the present park, and that the tithes of the rest of the parish should be accounted for to him from the time of filing the bill, and should be received and taken by him in future: that this agreement should continue in force during the incumbency of the present rector, and that he should undertake to consent to any application to parliament on the part of the *Carew* family to make this agreement perpetual: that the account should be taken by

1791.

Ferrars
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the Deputy Remembrancer, if the parties should not agree upon the value of the tithes to be accounted for ; and that as soon as the sum which should be found due upon the account should be paid to the plaintiff, both bills should be dismissed without costs, and that the deposit made for the rehearing should be returned.

[1605]

The causes stood over for the parties to consider this proposition : unfortunately, the result was, that the defendants declined to accede to it ; and it being understood that no further light could be thrown on these causes by any further hearing of them, we are at length driven to the necessity of pronouncing an adverse judgement on them. And it is with considerable reluctance that we shall now pronounce an adverse judgement between the parties, because after all the pains we have taken in the investigation of these causes, we see too plainly that it is impossible for us to attain the real justice of the case. The real justice of the case consists in a fair distribution of the glebe lands and tithes of the parish between the rector of the parish and the portionist, for it is very clear that there is a portion of tithes and a rectory existing in point of right separate and detached from each other. They were antiently possessions purely ecclesiastical, and presentable ; originally the advowsons of both were, if I mistake not, in the *Carew* family at the time of the execution of the commission directed to the bishop of *Winchester*, stated in the evidence. *Long* was the portionist under the presentation (as I apprehend) of that family. It does not appear in the cause at what period the portion ceased to be presentable, or how it became appropriated, but it has been in that state for a great number of years, and it has certainly been in the *Carew* family from the time of queen *Mary*. Undoubtedly, the portion did consist of a mansion-house, glebe lands, and tithes of different species, arising in different parts of this parish. There can be no doubt but that the specific glebe lands, and the specific lands and tenements liable to pay tithes to the portion were formerly ascertained and distinctly known ; that their value was known, and that the comparative value between the rectory and the portionary was also known ; they appear to have been taxed, and the tenths rated by their distinct values. The real justice of the case therefore between these parties is, that the rector should take all that belongs to the rectory, and that the *Carew* family should take all that belongs to the portion. Upon the very first opening of this cause, it was too apparent that it would be extremely difficult, if not impossible, to reach the justice of it : it was equally apparent, that the plaintiff and the rector were engaging in this cause upon very unequal terms, if the rector, standing upon his common law right, had it in his power to throw the *onus probandi* on the portionist ; and it was at first much doubted by the court, whether under the actual circum-

stances of the case, the rector had or had not that right. To have declared that he had no such right, would *have operated to shake a fundamental doctrine in the law of tithes, upon which the security of the possessions of the church mainly rests. The court entertained a hope and a wish, that the parties would, by agreement among themselves, do that justice to themselves which we could not administer; and we have more than once recommended it to them to compromise the dispute between them, and have proposed such terms as appeared to us to be fit and proper for them to accede to. These failing, we have endeavoured to use the authority and jurisdiction of the court, as far as it could be used towards ascertaining in an adverse cause this main point in the causes, of what the portion consisted. Commissioners of great worth and honour, not named by the parties, but by the Deputy Remembrancer, proceeded to make the inquiry; and they have succeeded so far, as to ascertain some of the particulars of which this portion consists, and we shall act upon this certificate as far as it goes, being now called upon to pronounce an adverse judgement. We shall direct the mansion-house and glebe lands occupied therewith, and any other glebe lands in the occupation of the rector belonging to the portion, to be delivered up, and an account of the rents and profits from the time of the plaintiff's institution to this rectory; and we shall also dismiss the plaintiff's bill as to the tithes arising upon such lands as have been ascertained to be tithable to the portion. But this falls far short of the real justice of the case, for we are perfectly satisfied that the commissioners have not ascertained the whole of the portion; and that if we give the rector his account of the tithes arising in all the rest of the parish, we shall give him that which in good conscience he ought not to have, though the strict rule of law may give it him. Whether under the actual circumstances of this case, the rule of law does give it him, and whether sitting in a court of equity we are obliged to act upon it, are questions upon which we have paused. The circumstances I allude to are these: it is sufficiently established in the evidence, that the rectors have been, for a considerable time past, and, probably, from the time of queen *Eliz.*, lessees of the portionary rent and render of 2*l.* and a fraction in money, thirty quarters of barley, seven quarters of wheat, four quarters of rye, all the tithe-oats of the parish, and all the straw of the rest of the tithe-wheat. The leases are not now extant, at least, they are not to be found at present; and there is no probability, if they were, that they are sufficiently explicit in the description of the thing demised, to ascertain the particulars of which it consisted. This unity of possession for such a great number of years, is too apt to produce a confusion of all boundary, not to have had its effect to confound the rights of

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*[1606]

[1607]

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the rector and those of the portionists. In general cases, we should hold it to be the duty of the tenant to preserve such a distinction between his own possessions and those of his lessor, as should enable him on the determination of his lease to deliver up peaceable and quiet possession of the thing demised to his lessor; and a court of equity would not have been disposed to have given any assistance to such a tenant who had so confounded his boundaries as to be unable to ascertain the thing demised, but on the contrary would go great lengths to oblige him to make his lessor a recompence in value. Ought then the rector of this parish, the lessee of this portion, under the circumstances I have stated, to be allowed to come into a court of equity upon the foundation of his common-law right against his portionist, without having first delivered back to him his portion? Mr. Solicitor General argued this question on behalf of the rector with very great effect, and he has satisfied our judgement upon it. This is the case of a rector newly presented, claiming under his common-law right to the tithes arising within his parish in the right of his church. There is no privity between him and former rectors, nor do the acts of former rectors bind his church. A succession of rectors differs very widely from a succession with privity of estate. To this rector therefore nothing seems imputable; on the other hand, this sort of bargain between the portionist, who has also the advowson of the rectory, and the successive rectors, especially, when we see considerable quantities of the land in this parish have been thrown probably from time to time into the park, and have rendered no tithes to the rector either in his own right or as lessee, is open to observation and suspicion. I once thought that the render in the lease having been made in very moderate terms down even to the commencement of the present incumbency, might, by comparison, be a good measure of the value of the portion: but, when I reflected upon the probable influence of the patron of the rectory upon that contract, I hesitated, and I thought it not unreasonable to recommend it to the defendants to accept of less beneficial terms between parties so circumstanced. We find ourselves obliged at length to decide according to the strict right; and though there is every reason to apprehend that the rector is in possession of more than belongs to his rectory, yet the account in this court must follow the possession. We have had it in contemplation, whether

[1608] there should be any further inquiry directed. It is possible, that as to twenty acres of the glebe land in possession of the rector, such an inquiry might be attended with some success: but we think it would be fruitless as to the tithes. Upon the evidence now before us, if there should be any discovery made of any further evidence, a personal decree to account will be no bar to any remedy which the portionist shall be advised to resort to, and he may bring his eject-

ment now for the twenty acres upon the present state of the evidence, if he shall be so advised; and therefore we do not think fit to incumber these causes with any other commission or inquiry: they have already depended too long, if a court can ever be too long employed in endeavouring to penetrate through, disperse, and clear away that darkness, in which time and accidents have involved the real merits of the question between the parties.

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M. 38 Geo. III. A. D. 1798. B. R.

Williams and another against *Ladner*. [8 Term Rep. 72.]

TRESPASS for that the defendant on 1st *September* 1797, and on divers other days between that and the day of exhibiting the bill of the plaintiffs, with force and arms and with divers cattle ate up, consumed, trampled upon, and damaged large quantities of corn, grain, and straw, of the plaintiffs at the parish of *St. Levan* in *Cornwall*; and 2dly, for seizing, taking, and carrying away, the same. Pleas: 1st, not guilty; 2dly, that the defendant before and at the several times when, &c. was lawfully possessed of and occupied divers, to wit, 500 acres of his own land in the said parish and county; and that there now is and from time immemorial hath been a custom in the parish, that such of the occupiers of land therein for the time being respectively as have had at any time corn growing thereon, who have thought fit to give notice in writing before they have set out the tithe of such corn after the cutting down of the same that they should so set it out, and of the times when they should so do, unto the owners or proprietors of such tithes for the time being, by affixing such notice on or before the *Sunday* previous to their so doing on the outside of the door of the parish church, have given such notice at such time and in such manner and have set out such tithe accordingly on the lands, &c. for the *use of the owners or proprietors thereof; and that the defendant whilst he so occupied the said lands, and before any of the said times when, &c. to wit, on 1st *August* 1797, cut down a large quantity of corn then growing thereon (to wit), &c. and afterwards and before any of the said times when, &c. on the 16th of *September* 1797, gave notice in writing (according to the custom), to the plaintiffs, being the owners and proprietors of the same tithe, that he should set out the tithe on *Friday* then next, should the weather then permit, and that he did then accordingly, viz. on the 22d of the said *September* (the weather permitting) set out the same on the said land according to the notice for the use of the owners or proprietors thereof; that the plaintiffs had notice of the tithes being so set out on the same day, and that the defendant then and there carried away the other nine parts; but the plaintiffs did not carry

Though the proprietor of tithes leave them on the land more than a reasonable time after they are set out, and after he has notice thereof, the owner of the land cannot justify in trespass turning in his cattle upon the land to depasture it in the usual course of husbandry, whereby the cattle consumed the tithes: but his remedy is either by distress or by action.
*[1609]

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away the tithe within a reasonable time after they had notice that it was so set out, but on the contrary wrongfully permitted the same to remain, and the same did wrongfully lie and remain upon the said land for a long space of time after the expiration of such reasonable time, to wit, continually and thenceforth until and at the said several times when, &c. The plea then set forth the like matter as to other corn cut down, whereof the tithe was set out, in the same manner and with notice similar to the other, but more particular as to the times and places of cutting down the corn and setting out the tithe; and because the defendant at the several times when, &c. each of them being after the expiration of the said several reasonable times to wit, at &c. could not depasture the grass there then growing on the said land whereon the said tithe was so set out and remained as above-mentioned, nor use the same in so ample, convenient, and beneficial a manner as he otherwise might and ought to have done, according to the usual and regular course of husbandry, without turning the cattle in the declaration mentioned, into the said land to depasture the grass there then growing, nor without moving the said wheat, &c. in the last count mentioned to a convenient distance, he the defendant, at those several times, did for the purpose of depasturing the grass growing on the said land, and using the same in such ample, convenient, and beneficial a manner as aforesaid, according to the usual and regular course of husbandry, turn the said cattle upon the land, and remove the said wheat, &c.; and the said cattle of their own accord ate up and damaged the same, &c. he the defendant doing as little

[1610] damage, as on those occasions he possibly could, consistently with his so depasturing, &c. The third plea stated generally, that the defendant was possessed of the land in the said parish, that he cut down the corn growing thereon, and set out the tithe, and that on the same day, &c. the plaintiffs had notice that the tithe was set out, but did not carry away the same; and concluded as the former plea.

To the two special pleas there was a demurrer; assigning for causes that they only stated generally that the plaintiffs had notice that the tithes were set out, without showing how or in what manner they had notice, or that the same was given by or on the behalf of the defendant; and also as to the last plea that the defendant had not alleged that the plaintiffs were the owners or proprietors of the tithes, or the proper persons to whom such notice ought to have been given. Joinder in demurrer.

Praed was called upon to support the pleas, and was asked whether the point had not been decided by the judgement of the court in *Shapcott* and *Mugford*, 1 *Ld. Raym.* 187. He said that upon examining that case it would be found that the question came col-

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laterally before the court, who decided it with a leaning to support the verdict, which might have been maintained on other grounds. For there was no doubt but that the plaintiff, who was the land-owner, had a right to maintain his action and recover damages against the defendant, who was the tithe owner, for having suffered the tithe to remain more than a reasonable time on the land to the detriment of the herbage. But admitting that the court did decide the very point now in question, (though it was not necessary for them to do so), still the judgement may not be deemed conclusive, if it be contrary to the general principles of law, reason, and convenience, or to other authorities, and the opinion of other judges on the same point. The case on the pleadings now before the court is shortly this. The plaintiffs, the tithe-owners, complain that the defendant's cattle have destroyed their tithes. The defendant, the land-owner, says that the tithes were duly set out on his land, of which the plaintiffs had notice, that a reasonable time for removing them passed, and then the defendant put his cattle into his land to depasture it, and the cattle ate the tithes. The result is that the plaintiffs have suffered a loss owing to their own default or neglect. But it is a general principle of law that a loss or hurt, which happens to a man by his own default or neglect, gives him no right of action. The plaintiffs by leaving the tithes on the land after notice that they were set out more than a convenient time for taking [1611] them away became wrong-doers, and liable to an action. Then it is not reasonable that the defendant should be deprived of the use of his land, by the continuance of that which is wrongful on the part of the plaintiffs, or make amends to the plaintiffs for a loss arising from their own wrong. And it would be inconvenient, not to the land-holder alone, but to the public also, that land should remain useless, as to the purposes of pasturage or agriculture; which will be the case, if the land-owner may not feed it with his cattle, or till it so long as the tithe-owner may leave the tithe there, through negligence or obstinacy. If the matter here pleaded would be an answer to a suit in the spiritual court for tithes, it should be a sufficient defence here in an action for the value of them, otherwise the judgement of the two courts would be inconsistent. But it seems from the judgement in *Bennet v. Shortwright* (a) that this matter would be a good answer to a suit in the spiritual court; for on the motion then made for a prohibition, this court expressly said, that if the parishioner setteth out his tithes, and the parson will not take them, or if they be destroyed by cattle by his laches, he shall not have tithe again. (Lord Kenyon said, it might be true that the parson should not have tithes in kind a second time, but

(a) 2 Leon. 101.

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that did not show that he should not have a remedy for the destruction of his tithe first set out, which had become his property.) The court in the case of *Webb v. Paternoster* (a), adopted and proceeded on the principle, which it is submitted should govern this case. Sir *William Plumer* had given license to *Webb*, an off-going tenant, to leave a rick of hay on the land until he could conveniently sell it, and some time afterwards leased the land to *Paternoster*, who two years after the license, without notice to *Webb*, put in his cattle, which ate the hay: *Webb* brought an action of trespass against him, and these facts appearing to the court on the pleadings, they gave judgement after much argument and consideration for the defendant, it being the plaintiff's fault to leave the hay more than a convenient time. So here, the law allowed the plaintiffs to leave the tithes on the land a convenient time, and it was their fault to leave them longer. It is remarkable that in considering that case

[1612]

Dodridge J. put the case now before the court, as an instance to illustrate the principle. He said (2 *Roll. Rep.* 143, 144.) if a parson suffer his tithe to lie on the land, shall not the owner put his beast on the land? inferring that he might: and Sir *H. Montague* Lord Ch. J. assented, stating the reason, that it is the parson's folly. The same principle had been recognized and acted upon before in a case very analogous. It is thus reported (b)—In error, it was said to be law, that if all the neighbours of a vill carry their corn out of the common field, except one who will not carry his through obstinacy or negligence, there, the rest may put their beasts into the field, and shall not be trespassers to the other. In

Supra 623.

Dodson v. Oliver (c) the law respecting the tithe of milk is thus stated—If there be no particular custom or usage, the parishioner is obliged to pay every tenth meal, to milk his cows at the usual place of milking into his own pails, and the parson is obliged to fetch it away from the milking place in his own pails in a reasonable time; and if he do not fetch it away before the next milking time, the parishioner may justify pouring the milk on the ground, because he then has occasion for his own pails. The same argument holds here. A reasonable time for removing the tithe had passed; the defendant had occasion to use his land, and therefore may justify putting in his cattle. The destruction of the tithe in either case arises from the default or neglect of the tithe owner.

Gaselee contra, was stopped by the court.

Lord *Kenyon* Ch. J.—This is a question of universal concern: but as the point appears to have been solemnly decided in the court of Common Pleas near a century ago, and that judgement was

(a) *Palm.* 71. 2 *Roll. Rep.* 143. 152. *Godb.* 282. *Poph.* 151. S. C.

(b) *Bro. Abr. tit. Trespass*, 352.

(c) *Bunb.* 74.

founded on a prior case in the 22 Car. 2. in this court, I think it ought not now to be disturbed. That decision is also supported by reason; it is much better that the owner of the land should appeal to the laws of his country for redress than that he should take the law into his own hands. If the defendant were to succeed in this case, it would establish this proposition, that if cattle stray on the property of any person he may destroy them: but he is bound to drive them out in a reasonable manner. Here the defendant might either have brought an action against the plaintiffs for not taking away the tithes, or he might have distrained the tithes damage feasant. Without, however, inquiring into the reasons on which the case in 1 Ld. *Raymond* 187. proceeded, it is sufficient for us to say that that case was fully considered, and that it was there decided that the owner of the land cannot turn on his cattle before the tithes are removed, but must resort to his action; and every case that inculcates the principle, that a party should apply to the law rather than take the law into his own hands, ought to be adopted in courts of justice.

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Lawrence J.—I think there is a great deal of reason in the argument urged on behalf of the defendant in this case: but it would be too much for us to upset that case in *Ld. Raymond*, in which this point was decided. (a)

Per curiam.

Judgement for the plaintiffs.

Tr. 2 & 3 Geo. II. A.D. 1728. C. B.

Barton v. Hollis. [Fitzg. 78.]

THE defendant having libelled in the spiritual court for tithes, as vicar of S. did there set forth, that by ancient and laudable custom, all the small tithes of the parish of S. do belong, and have belonged to the vicar of the said parish for the time being; and that in the year 1723, for the augmentation of the aforesaid vicarage, the vicar was further endowed of all the tithes of hay within the said parish; and for those he libelled against the then defendant, being farmer of the rectory. Now for a prohibition the plaintiff suggests, that the rectory of S. aforesaid, was appropriated to the priory of D. and so brings it to *Henry* the Eighth, under the statute of dissolutions, and from him to the dean and chapter of *Norwich*, whose lessee he is; and that the rectory aforesaid, and all the lands thereunto belonging, were, at the time of the dissolution of the said priory, to which, &c. and have been at all times before and since time out of mind discharged of tithes.

Prohibition granted, with an order to declare forthwith where the vicar libelled against the lessee of the rector for hay-tithe. The question of title not being properly triable upon motion.

(a) See also *Mountford v. Sidley*, 3 Bulstr. 336. *supra* 425.

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Serjeant *Skinner* for the plaintiff. — All matters cognizable by the spiritual court should be entirely spiritual, *Ro. Abr. tit. Prohibition*, 281. 308. 311. And since the dissolution of monasteries, a rectory impropriate is to be considered as a lay fee. Further, where the question is about the right of tithes, as to whom they shall be due, there, the spiritual court have jurisdiction; but they have none, where the question is, whether tithes are due or not. And [1614] if they should proceed in this case, they must determine, whether the glebe of this rectory is tithable; for the plaintiff is farmer of the glebe, and the libel is for the tithes of the rectory of which the glebe is parcel; now it is against common right that the glebe should be tithable. However, it is a question not fit for their determination. If the plaintiff should plead in the spiritual court a discharge of tithes under the statute of 31 *H. 8.* they would not receive such a plea. *Raym.* 360. *2 *Co.* 44. *Vid. Mo.* 761. † *Yelo.* 86. *Wats.* 200.

* *Supra*
167.

† *Supra*
226.

Serjeant *Eyre* for the defendant. — Two questions will arise, 1. Whether the vicar can have tithes out of the glebe: 2. Whether, this being between the vicar and impropriator, the spiritual court have jurisdiction. As to the first, if there be an express grant of tithes out of the glebe, it is good, *Cro. Eliz.* 578. *Mo.* 910. As to the second, the impropriator being in the place of the parson is to be considered as an ecclesiastical person, and so the rectory impropriated is to be taken, as to the vicar, as in the hands of the parson, and therefore the right of tithes will be the only question in the spiritual court; for it will be as if he should claim those tithes against the parson, who could only object that he is parson, and that the tithes are claimed out of his glebe in his own possession. And this being the case, the statute of *Circumspectè agatis* excludes the jurisdiction of the temporal courts. *Ro. Abr.* 309. falsely printed 316, 310, 311. 2 *Brownl.* 36. *Mo.* 907. *Godh.* 196. 2 *Bulstr.* 157. 3. *Bulstr.* 220.

Eyre, Ch. J. — This is a suit by the vicar against the lessee of an impropriator of a rectory for the small tithes of the parish, and the hay-tithes of the glebe, which the vicar claims by prescription and endowment; which I hold to be good; for the glebe may be charged by an express and particular charge, as appears by the cases cited. I do not find the prescription is denied, nor otherwise answered, than by setting up another prescription against it, which is in effect in *non decimando*, and no plea out of the mouth of a layman: for if the parson demise the glebe, his lessee shall pay him tithes. And this is not like a particular prescription of which every occupier of the land should take advantage. Wherefore he inclined no prohibition should go. But it was thought proper these points should

not be determined upon motion, so that he consented with the rest of the judges, that a prohibition should be granted, upon which the plaintiff was ordered to declare forthwith.

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M. 14 Geo. III. A.D. 1774. Scac.

[1615]

Lloyd v. Bentley. [MS.]

ON a motion for a new trial, in a cause which had been tried before *Eyre B.* at *Shrewsbury*, on the statute 2 & 3 *Ed.* 6. for not setting out tithe of clover seed, the court held, that the seed was not to pay tithe at the mill, but that the tenth part of the stalk, &c. was to be set out in the field after it was severed from the ground.

S. C.
Serj. Hill's
MSS.
vol. ii.
p. 497.
In tithing
clover-seed,
the tenth

part of the stalk is to be set out in the field after it is severed.

H. 40 Geo. III. A.D. 1800. Scac.

Illingworth v. Leigh. [MS.]

THE bill in this case was filed by Dr. *Illingworth*, as vicar of *Fillongley*, in the county of *Warwick*, against the Honourable Mrs. *Leigh*, the impropiatrix of the rectory, and a Mrs. *Baker*, one of her tenants; and the principal object of the suit was, the recovery of agistment tithe.

In support of the claim, the vicar produced the minister's accounts from *Michaelmas* 27th, to *Michaelmas* 28th, *H.* 8. which stated the rectory to consist only of garbs and hay.—*Firma rectoriæ de Fillongley, quæ solummodo consistit in garbis et fæno.* He showed too, from an ecclesiastical survey taken in 26 *H.* 8. the relative value of the rectory and vicarage at that time, inferring from the great proportion which the value of the latter bore to that of the former, that the vicarage must have had all the small tithes. The next evidence was a suit in 1654, instituted by two persons of the name of *Holbeche*, as lessees of the rectory, claiming, among other tithes, that of herbage: the defence then set up was, that the rector was never seised of the herbage tithe, and that it was due to the vicar, if to any one. The decree in this cause was not produced, nor any thing more than the bill and answer. This evidence was followed by the production of several terriers; some of which stated the vicar to have *all small tithes* generally, and others gave him expressly and in terms the herbage of barren cattle; and three of those of the latter description bore the signature of a person, who was at that time the lessee of the rectory. It was in proof, that all the vicarial tithes had been time out of mind under a general com-

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The first of these terriers which the vicar produced, was signed by the churchwardens only. Two objections were taken to it:

Terriers,
though
signed by

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the church-
wardens
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They are
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1st, it was insisted that it was no terrier at all, because made by the churchwardens only, and not signed by the vicar: that the minister's signature was essential to give the instrument the character of a terrier: that where it wanted that signature, the court had often refused to receive it, though it came from the minister himself. 2dly, It was insisted, that even supposing it to be a proper terrier, yet that it could not be admitted in evidence in this cause as against the rector, because not signed by any person claiming under, or on the part of the rector.

In answer to this it was said, that notwithstanding this informality, the instrument in question must be considered as a terrier: that it purports to be an account of the church, is signed, as far as it goes, by the proper officers, and comes out of the proper office, the bishop's registry, : that terriers were often signed by curates only, and yet were received in evidence: that they were entitled to credit, because returned to the bishop upon oath: that the objection, that it was not signed by any one on the part of the rector had been often over-ruled: that terriers were so received, because evidence of reputation; and they were here offered to prove that of which reputation was evidence: that the terrier in question, besides coming from an unsuspected place, was signed by persons perfectly disinterested, to whom it was a matter of entire indifference whether they paid to the rector or the vicar; at the same time that it was of importance to them to ascertain to which of them they were to make their payment, in order that they might not be liable to make it twice over.

The court were of opinion, that the terrier was admissible, for that it had been recognized in the character of a terrier by the spiritual court: that such an imperfect terrier had been often received of late in this court: that it was true, Lord C. B. *Skynner* had once rejected it, but that he had afterwards changed his opinion, and since that time it had been uniformly received: that the present terrier was signed by persons not only no way interested; but whose duty it was from their official situation to do it: and that the want of the vicar's signature made it a stronger piece of evidence in his favour.

[1617]

The case so made out by the vicar was met by the impropriatrix with the following evidence. She first produced terriers of antecedent date to those which had been brought by the vicar, some of which were signed by the vicar only, but none of them made any mention of agistment tithe, and one of them, signed by the vicar and churchwardens, purported to be "*an account of all such things as are due and tithable to the vicar of the parish of Fillongley.*" She next produced the deposition and decree in that suit, the title and answer in which had been brought forward by the vicar. That decree gave the rector 2s. for every pound rent for the agistment

tithe; and it purported to proceed (among other evidence) upon two very ancient accounts in the time of *E. 4.* But this decree was only against one of the defendants, *Taylor*; nor did it appear that the cause was ever brought to a hearing against the others. And *Taylor* appeared to be occupier only of a particular piece of land, formerly parcel of *Fillongley Park*. She then read depositions in another cause, by which it appeared that several compositions had been received for the herbage-tithes of *Fillongley Park* by a Mr. *Paulett*, the then impropriator. She afterwards offered in evidence the books of former lessees of the rectory, the entries in which shewed the receipt of sums of money for the herbage-tithe, and some of those entries were made by those very lessees who had signed the terriers acknowledging the vicar's title to the herbage-tithe.

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v.

Leigh.

The admissibility of this last evidence was strongly objected to by the vicar's counsel. They said, that although a parson's book might be read, yet that of an impropriator or his lessee could not: that a spiritual rector or vicar was under no temptation to fabricate evidence, having no estate which he could dispose of, nor any interest beyond his own incumbency: that the impropriator had the inheritance, the lessee an assignable interest; that they therefore had both of them strong inducements to fabricate, inasmuch as the saleable interest of the latter, and the reversionary estate of the former, might be greatly benefited by it: that the case of the parson's book respecting his tithes had always been considered as a solitary exception to the general rule: that it was so stated to be by lord *Kenyon* in the case of *Outram v. Morewood*, 5 *Term Rep.* 123. that it was not therefore to be built upon as establishing a principle, nor to be followed into all its consequences: that the books of a receiver, charging himself with the receipt of money, in such a case might be admitted, because there is no suspicion of forgery, the receiver having a direct and immediate interest to the contrary; it not being supposable that he would charge himself with money [1618] which he had never received: that these books could not be admitted as evidence of reputation, because reputation itself would be no evidence in this case, where it is to prove a particular fact: that there was no instance in a question simply of tithes where the books of a former impropriator had been received to assist the claim of the present impropriator: that in the anonymous case in *Bunb.* 46. (a)

Books of lessees of the rectory, containing entries of the receipt of agistment-tithe admitted, after the determination of their lease, to support the claim of the impropriator to that species of tithe.

(a) That case is as follows — " Upon a bill by an impropriate rector for a mortuary, the book of some of the predecessor impropriators was offered to be read in evidence, wherein were entries of payments of mortuaries; but it was objected, that although a parson's book (who is only tenant for life, and therefore not supposed to enter any thing with partiality to his successor) may be read; yet the book of a lay impropriator, who

has the inheritance, ought not to be read. To this it was answered, that the book of a lord of a manor, who has the fee, is admitted as evidence of quit-rents. (*Sed quære*, if the bare entry of the lord of a manor in his book be evidence, though a bailiff's accounts, where it appears the rents have been paid and allowed in the account, are admitted as evidence) *Per curiam*, let the book be read."

1800. it is true the books of the impropriator's predecessor were admitted: but that was not a suit for tithes, but for mortuaries: besides, that that case was not law, and had never been allowed in this court: that the case of *Woodnoth v. Lord Cobham*, *Bunb.* 180. was clearly distinguishable from the present; for the entries there admitted were not those of a former impropriator or his lessee, to support the claim of the plaintiff, impropriator, but were the accounts of a steward of the father of the defendant, a parishioner; and those accounts stood clear of all suspicion, the steward having no interest to induce him to state such a payment to have been made to the vicar, if in point of fact it had not been made.

Illingworth
v.
Leigh.
Supra 653.

But *per curiam*, the question is, whether there be any degree of influence upon the mind of a lessee more than on that of a rector or vicar, whose books are constantly received to support the demands of his successors. It would be of no avail to a lessee to fabricate, since he could not make what he might insert evidence during the term either for himself or his assignee. These are general accounts of the receipts made during the term, and seem entitled to the same credit with the entries made by a parson during his incumbency. Lord *Kenyon* could not mean to say, that the case of a parson's books was the only exception to the general rule, that any other case falling within the same principle would not be admitted.

[1619] It appeared from these books, that in the years 1718, 1719, and 1720, the lessees had received in several instances for the herbage-tithe; but that in 1727, 1728, and 1729, there were no receipts by them of that species of tithe; and upon the whole, of at least a hundred occupiers in the parish, only two or three had ever paid it. It also appeared from these entries, that the lessees had received a composition for coppice wood, a circumstance which was relied upon as negating the extreme restriction of the minister's accounts, and showing that the *solummodo* was incorrect. These written documents were followed by some parol evidence. A former tenant of a piece of pasture called the *Deep Moor*, deposed, that he had paid to the lessees of the rectory for eleven years 10s. *per annum*, for herbage-tithe, and had also paid during part of that time 2s. 6d. *per annum* to the vicar, but what he had paid this last sum for he knew not; and had discontinued it at the desire of his landlord. Two or three other witnesses stated, that the lessees of the rectory had insisted upon an herbage-tithe in those years when the lands were not ploughed.

Upon this evidence the court directed an issue, to try whether the vicar was entitled to the agistment tithe, which came on to be tried at the Summer Assizes 1799, at *Warwick*, before Mr. *J. Heath*,

when a verdict was found (a) in favour of the vicar. Upon the trial of the issue, the counsel for the impropriatrix offered in evidence depositions in a suit between *Holbeche*, a former lessee, and *Whadcock*, an occupier, but produced neither bill nor answer.

1800.

Illingworth
v.
Leigh.

It was objected by the vicar's counsel, that without the bill and answer, or proving that all due diligence had been used to discover them, but without effect, and giving collateral proof of their contents, these depositions could not be received : that it was necessary to produce the bill and answer, in order that it might be seen who the parties were, and what were the questions in issue between them, because the depositions could be evidence only between the same parties, or those claiming under them, and upon the same point : that it was clear from the depositions themselves, that the vicar was not a party to the suit, because he was examined as a witness ; that the suit therefore was, as to him, *res inter alios acta* : that the only ground on which it could be contended they might be admitted was, where hearsay or reputation was evidence : that hearsay could not be evidence in this case, because it was to prove a particular fact : that the very depositions themselves were confined to the claim of agistment tithe in a particular place, and did not affect to speak of the general custom of the parish. The learned judge was clearly of opinion that they were inadmissible, and accordingly rejected them, and cited *Gilb.* 65. *Sir Tho. Raym.* 336. *Newburgh v. Newburgh*. 1 *Br. P.C.* 347. *Baker v. Sweet**, *Bunb.* 91. *Alderton v. Magawley*, 3 *Br. P.C.* 208. A new trial was moved for upon two grounds : 1st, that the learned judge was mistaken in rejecting the above evidence ; 2d, that the verdict was against the weight of evidence. And the court granted a new trial expressly upon both of these grounds, but gave no reasons, as I am informed, why they thought the evidence which the learned judge had rejected, ought to have been admitted. Upon the second trial a verdict was found for the impropriatrix, where the matter ended. (b)

Depositions received in evidence without producing either bill or answer, or giving any proof of their contents.

[1620]

* *Supra*
629.

H. 40 Geo. III. A. D. 1800. In Canc.

Rose v. Calland. [5 Ves. jun. 186.]

THE bill was filed by devisees in trust, to obtain the specific performance of an agreement entered into by the defendant for the purchase of an estate.

The sale was by auction ; and ninety-four acres of the estate were stated in the particular of sale to be exempt from the tithe of hay.

Whether a presumption from non-payment of tithes be a bar to the claim of a

(a) At the trial the vicar produced the minister's accounts for three successive years, the whole time the rectory was in the hands of the crown. The rectory was appropriated to the priory of *Mastoke*.
(b) See also *Byam v. Booth*, 2 Pri. 234. *infra*.

1800.

Rose
v:
Calland.

lay impro-
priator.
Dubitatur.
* Supra
1490.

It was objected, that this exemption was not ascertained by the abstract. No tithe of hay had ever been taken within the memory of man, nor any thing paid in lieu of it; and other tithes had been regularly taken, and the tithes of the parish were all in lay hands.

It was argued by the Attorney General for the plaintiff, that in *Strutt v. Baker**, the court decided upon the principle, which must govern this case, that the rector having been only in possession of one-third of the tithes, they would not help him to get possession of the other two-thirds: that the presumption ought to be raised against a lay impropriator: that the absurdity of holding, that there cannot be a presumption against him, is evident from this instance—an estate was sold in an adjoining parish free from the payment of great tithes: but the conveyance of the titles [1621] could not be found; and the same objection would have been made, if at last the deeds, conveying the tithes, had not been found by accident.

On the other side it was said, that in *Strutt v. Baker* there was a ground, since the case of *Fanshaw v. Rotheram*, for saying, the two-thirds of the tithes had been severed: that before the case of *Fanshaw v. Rotheram*, the law was monstrous; obliging the defendant against a claim of tithes to produce the original deed, by which that portion of tithes claimed was severed: that the longer the time, the more difficult it was to make out the possession: but that that was put an end to in that case.

Lord Chancellor.—I can do nothing at present but send this to the Master. There is no state of the case. The question is very important. I should like to have the Master's report, and a state of the case; for if I was now to hold it a flat objection to the title, that would go upon the presumption, that it is a clear point of law that a lay rector, who can convey, contract, and diminish his right, which a spiritual rector cannot, is not to be barred from his right to any particular tithe by the length of time, or the circumstances attending the receipt of his other tithes. I should be very loth to go that length. On the other hand, I should be very unwilling to make a man purchase a law suit. The argument is certainly very strong upon the instance mentioned by the Attorney General; where the deeds were found by accident.

For the defendant, it was afterwards argued, That there have been two or three cases lately in the Court of Exchequer upon this subject: that in *Nagle v. Edwards*, this distinct point was argued very fully in that court; and it was determined, that there can be no presumption from any length of time against a lay impropriator.

Lord Chancellor.—If that is so, I am afraid I cannot make a purchaser take a title in the teeth of that decision.

The Attorney General in reply said, It was very material to know the nature of the defence in those cases; perhaps it might have been a prescription *de non decimando*: and he referred to *Medley v. Talmy*.

1800.

Rose
v.
Calland.
Supra 559.

Mr. *Graham* (*amicus curiæ*) mentioned the case of *Trinity College v. Barrington*, (a) in the Court of Exchequer, in the time of Lord Chief Baron *Eyre*; where this point was decided in favour of the claims of tithes. The portion of tithes claimed had not been paid for a great length of time. The Chief Baron in giving judgement, acknowledged the clear distinction between a lay impropriator and a spiritual rector, from the restraint of alienation upon the latter; but he went upon the idea, that the law clearly was, that no length of time would bar a lay impropriator. [1622]

The reference to the Master was not made; but the cause stood for judgement.

Lord *Chancellor*.—If I was to send this case to the Master, I should create a needless expence; for upon the case in the Court of Exchequer, *Nagle v. Edwards*, which I have looked into, my difficulty is this; can I make a person take a title in the face of that decision? If I do, I decree him to enter into a law suit. That case was upon the tithe of agistment. There was a very long possession, and all the inconvenience to induce the court to raise the presumption. I read that case, and also Lord *Petre v. Blencoe*, very attentively. It rather struck me that there was a great deal of evidence. I desire to be understood as not entirely agreeing with the determination of the court of Exchequer. But I should be in a strange situation, in desiring a purchaser to take this title, because I think the point a pretty good one, though the court of Exchequer have determined against it. It is telling him to try my opinion at his expence. Unfortunately, they have very distinctly stated it in the particular to be free from hay-tithe. I do not think the court of Exchequer weighed sufficiently the effect of *Scott v. Airey*, and the other cases.

Supra 1484.

Supra 1174.

Dismiss the bill without costs; and let the deposit be paid according to the terms of the agreement.

M. 41 Geo. III. A. D. 1800. Scac.

Coppard v. Page. [Forest. Rep. i. 1.]

Nov. 17.

THIS was a bill for the tithe of fish caught in the port of *Hastings*, and the only question was, whether it was brought against the proper parties. The defendants were proprietors of different fishing-boats at *Hastings*; a number of boats were employed in

In a bill for
tithe of fish,
all the
persons in-
terested in
any one per-

(a) 4 Wood's Decr. 276.

1800.

Coppard

v.

Page.

particular ad-
venture,
must be
made par-
ties.

the fishery, and the adventurers in each consisted of the owners of the boat, the owners of the nets, and the master and crew of the boat, among whom the proceeds of each boat were divided according to agreement: the masters of the boats made the division, and were accountable for the amount of each person's share.

Plumer and *Pemberton* for the defendants. — The bill does not comprehend all the parties interested in the question, for the owners of the nets and the masters and crew of the boat are entitled to a share of the profits, and therefore should have been made parties to the bill.

Richards and *Hall* for the plaintiff. — It would be impossible to succeed, if all the persons engaged in the fishery must be made parties, as the masters of the boats make the division of the profits, and are accountable for the amount, they are the proper persons against whom to bring the bill; at any rate, this objection is not properly made, as it is in the nature of a plea in abatement; a plea in abatement must shew who are the proper parties, and so ought the defendants in this case; not having done so, they cannot take advantage of the want of parties in this manner.

Plumer in reply.

We do not contend that all the persons engaged in the fishery should have been joined, but that the plaintiff ought to have selected all those engaged in any one adventure, as the master, the crew, and the owners of the nets and boats. The master of the boat is only the agent for the other parties, who are equally interested in the question. There is a distinction between a plea in abatement, and the objection now made; by the defendant's answer, the plaintiff is apprised that other parties are concerned, and he might have called upon the defendants by interrogatories to state who they were. It is not usual in an answer to do more than to apprise the plaintiff that there are other parties concerned.

The court being of opinion, that all the persons interested in one particular adventure should have been joined,

The bill was dismissed.

Sittings after M. 42 Geo. III. A. D. 1801. Scac.

Dec. 19.

Worrall v. Miller and Sweet. [Toller's Treat. on the Law of Tithes, 124.]

Exotics
raised in
green-
houses and
hot-houses
not tithable.

BILL by impropriate rector against nurserymen within the parish for the tithes in kind of all the produce of the nursery-grounds, as well for young trees, ordinary fruits, and garden-stuff, as for pines, grapes, and all exotics produced or brought to perfection in hot-houses and green-houses. Defendants admitted his claim to tithes

of all the productions of their nursery-grounds, which they had offered to settle and account for; but denied it in regard to any productions forced or preserved in buildings; (that is to say), pines, and other exotics which they admitted they cultivated in their houses; insisting that those articles were not tithable. The court decreed, that so much of the bill as prayed an account of pine-apples, grapes, and other exotics raised in hot-houses and green-houses should be dismissed without costs, and that the bill should be dismissed with costs.(a)

1801.

Worrall
v.
Miller

Sittings after H. 42 Geo. III. A.D. 1802. Canc.

O'Connor v. Cooke. [6 Ves. 665.]

Feb. 24, 25.

BILL by lessee for 20 years under *Trinity College, Cambridge*, of all tithes great and small of the hamlet or district of *Streetfield*, in the parish of *Monkirby*, against an occupier of the lands for an account of the tithes of milk and agistment subtracted since *Michaelmas* 1797.

Issue directed on a *modus* for certain lands amounting to 1s. an acre for all tithes, notwithstanding a strong appearance of rankness.

Defendant, by his answer, set up a *modus* of 20*l.* a-year, payable half-yearly, for the lands called *Streetfields*, in lieu and satisfaction of tithes; and suggested that such *modus* had been payable long before time of memory, and did not exceed the value of the tithes for which it had been payable, which he represented to be about 50*l.* a-year. The depositions stated in substance, that *Streetfields* was an entire farm of near 400 acres; within the rectory was *Cestersover*, and other hamlets. *Streetfields*, in its then state, was worth 30*s.* an acre, if in tillage would be worth 40*s.* The yearly value of the great and small tithes in its then state was from 3*s.* to 5*s.* an acre, (according to different witnesses,) if in tillage would be worth 15*s.* computed from the then prices. The sum of 20*l.* was immemorially paid as a *modus* or rate tithe in lieu and satisfaction of all tithes. Supported also by general reputation.

The other evidence was an extent, 3 *Rich* 2. 1380., and an inquisition *post mortem*, 19 *Ed.* 4. A. D. 1480. (b)

The Solicitor General and *Bell* for plaintiff. — The *modus* set up of 1*s.* an acre is too rank. *Troutbeck v. Lawson* (c), *Startup v. Doderidge*. Where rankness is so plain the court will not send it to an issue; otherwise it must be carried to this extent, that the court can in no case decide without an issue. **Moore v. Beckford*. †*Ekin v. Pigot*. From acts of parliament and other things, of which the court can take notice judicially, they can judge of rankness, and, where it appears clearly, can decide upon it. It depends upon the

Supra 587.

* Supra
1166.
† Supra
783.

(a) See *Adams v. Waller*, supra 1204.

(b) It was observed by the Lord Chancellor, that the instruments made the value of the tithes

unaccountably large, in proportion to the value of the land.

(c) 1 *Wood's Decr.* 225.

1802.

O'Connor
v.
Cooke.

word "*garbarum*" (a) occurring in the extent, whether it includes every thing bound up into sheafs or bundles: whether tithes were formerly payable upon the arable lands.

Supra 806.

Supra 1166.

* Supra
1058.

† Supra
800.

‡ Supra
784.

Mr. *Romilly* and Mr. *Martin* for defendant. — There must be an issue. The payment must be presumed immemorial, unless there is something in it destructive of itself. By refusing an issue in such a case as this, numerous decisions will be overturned. The consideration of rankness of a *modus* is very different when applied to a parochial *modus* for any particular article even throughout a parish, and when payable for a particular district. In *Sansom v. Shaw* (a) the doctrine of a rank *modus* was considered a sort of innovation. That this is a question of fact appears from *Pyke v. Dowling*. In many other cases upon smaller or greater payments, the court has considered some of them good, and some fit for a jury. *Bedford v. Sambell* *, *Ekins v. Dormer* †, and *Hardcastle v. Slater* ‡. The objection of value was greater than in this case. In a late case, in *Scac. Fermor v. Lorraine*, evidence of the value of the rectory very ancient was not considered sufficient to prevent it from going to a jury.

* Supra
1191.

† Supra
1238.

‡ Supra
1412.

The inquisitions are inaccurate, and favour the family, and the estate is taken at a nominal value. Issues have been directed on a higher *modus*. *Twells v. Welby* *, *Ashby v. Power* †, *Edge v. Oglander* (b) is certainly a very strong case. In *Atkyns v. Lord Willoughby de Brooke* ‡, the court was disposed to decide against the rector, if he had not insisted upon an issue. In the receipts the expression "rate tithe" is often used, but it cannot be inferred that it is not a *modus* because the clergyman chooses to call it a rate tithe. These payments were not anciently called *moduses*.

Supra 802.

Richards v. Evans.

The Solicitor-general replied.

Lord Chancellor. — The question is undoubtedly a question of fact: tithes of agistment and milk are the tithes the lands yield at present. The account is of course, unless something is set up by the defendants to shew the demand has been otherwise satisfied, or that he is ready to satisfy it in the way a rector is entitled. The defence is a payment from time immemorial in a strict sense. According to the constitution of this court, it may take to itself the decision of every part put in issue upon the record, and this was known long before Serjeant *Belfield's* time (c). Courts of equity in ancient times were more in the habit of deciding on questions of fact than in later times. If any reasonable doubt has been thrown upon immemorial payments, it has been thought wise to send the

(a) See *supra* 806. n., where this case is observed upon.

(b) Cited *Kennedy v. Goodwin*, Bun. 301.

(c) See *Sansom v. Shaw*, Gwill. 806., and the note, *ibid.*

question of fact to a jury, and I cannot suppose there is any prejudice in a tribunal appointed according to the constitution of the country. Upon the question of fact, whether there has been this immemorial payment, the magnitude of the payment is but evidence of the improbability that it was immemorially paid, on the inference that the landholder would not so long ago have agreed to have come to a composition so far above the value. On the other hand, a great deal of observation has been fairly applied to that. In this case for many years back, during which, in all probability, the payment was not half the value of the tithe, 20*l.* *per annum* was paid for all tithe when the value of the agistment alone was 50*l.*; so that the question cannot always be determined by the single fact of the relative value of the tithe and the payment in lieu of it. The rankness being but evidence of the immemoriality of the payment forms no objection in point of law to the *modus*. If you can infer that it has existed, the inequality of the payment forms no objection to it. Therefore in the case in *Blackstone* (a) the judges certified that 2*s.* 6*d.* was not an illegal payment for a lamb. As to the tithe of particular things, it is observed in all these cases (b), that the inference from the magnitude of the payment is much stronger against the fact that it is immemorial, than in an agreement to pay so much *per acre*, and *a fortiori* for a particular farm; for it is perfectly easy, in almost any period of our history, to ascertain what a lamb was worth; and therefore to conjecture upon what in any place parties would agree. But what is the value of land in a particular parish, and what therefore it is proper to give *per acre* is a very complicated question. The owner might have been in possession of land of very different values, and might commute upon the whole; though, if not an average commutation, it would be a very improvident commutation for a distinct part. The ownership might have been severed, and then it would be very rash to conclude against a *modus*, admitted to be too great for any particular part; when the very foundation is, that he thereby got the liberty of compensating for the tithes in the other lands. So, upon a farm *modus*: I cannot weigh the propriety of it, but I cannot forget that great judges have said in equity, and put it to juries that there may be a convenience in having a farm *modus*; which may induce an individual to give more in that way than he would as a *modus* for particular tithable practice, or *per acre* of arable land, and not including hay, &c. and they have stated that piety might induce them to give rather more than less than the value to the clergyman. With regard to the cases I never could persuade myself that 1*s.* an acre upon the principle of rankness was not pro-

1802.

O'Connor
v.
Cooks.

(a) *Pyke v. Dowling*, 2 Bla. Rep. 1259. *supra* 1166.

(b) *Richards v. Evans*, 1 Ves. 59. *supra* 802.

1802.

*O' Connor*v.
Cooke.

bably a monstrous payment, and that the payments sent to be tried at law were not monstrous; but still the judges have thought that even such payments ought to go to trial, and verdicts under which even more than 1s. an acre has been claimed have been confirmed. What is this more than 1s. an acre for *all* tithes of this farm, in whatever form cultivated or occupied? There is very little evidence, that this land was formerly arable. I cannot conclude that it was not; or that this *modus* may not be shewn by some evidence to be as reasonable a commutation for tithes, even put so distributively, and not as a farm *modus*, as in some of those cases where 1s. an acre has been given for tithe of hay alone. The cases are certainly strong, but issues have been directed in cases full as strong, and judges have acted upon them afterwards. The case tried by Mr. Justice *Buller* was exceedingly strong (*a*); one circumstance was exceedingly strong as to the value of the whole rectory at the time. I remember a case of presumption upon the advowson of *Chester-le-Street*. The manor was granted to the *Milbank* family, with an express exemption of the advowson. They had presented in one or two instances; and the jury was directed by Lord *Mansfield* to presume that the crown had made a grant, which grant was not produceable, and Mr. Justice *Buller* held that direction of Lord *Mansfield* perfectly right. Lord C. J. *Eyre* was no friend to the doctrine of presumption; yet he sent that case (*b*) back to be tried upon the presumption, whether 1s. an acre was a good *modus* upon land proved worth 16s. an acre, and four years before 13s. an acre. Can it be doubted, whether this was a fair commutation? yet the court of Exchequer said it was a question of fact, and they sent it back to be tried, and the conclusion was right. Issue directed. Verdict for plaintiff in the issue, defendant in equity. On Nov. 29, a motion was made for a new trial, on the ground of misdirection of the judge, and new evidence since discovered.

S.C. A.D. 1803. [7 Ves. 535.]

June 16.

Motion for new trial. — Counsel in reply stopped by the court, and held by the Lord Chancellor, that there ought to be a new trial; not that he was dissatisfied with the verdict upon the facts but on the ground, that the points in the case had not been distinctly laid before the jury, and that new evidence had been discovered.

Sittings after H. 53 Geo. III. A.D. 1803. Canc.

March 19.
22.*Hawkins v. Kelly.* [8 Ves. 308.]Lease for
years by a
rector hav-

THE Lord Chancellor. — This bill is filed under circumstances I am sorry to hear of: a demise by a rector to four farmers; making

(a) *Twells v. Welby*, *supra* 1192.(b) *Twells v. Welby*.

them the parson to provide for the church. The rector dying in *March*, the antecedent rent was due the preceding *Michaelmas*. The defendant, at *Michaelmas* next after he was inducted, received from these farmers, as and for a year's rent, the sum of 227*l.* 18*s.* The bill insists, that as that sum was paid as and for a year's rent, the executors of the deceased rector are entitled to a proportion, not demanding a proportion according to time, or with reference to any particular ratio; but insisting upon some proportion. In answer to the demurrer for want of equity, it is said, that though the lease became void in *March* by the death of the rector, and, though, under the terms of it, no rent was due from the preceding *Michaelmas*, yet it is not to be denied, that the persons who engaged from thence to *March*, were under certainly an imperfect, but in some degree a conscientious obligation to pay for the use and occupation of the property belonging to the rectory in that period. It is clear, the incumbent having thought proper to make this lease, the rent payable the last *Michaelmas* preceding his death, is all that in law he is entitled to receive; and he could set up no demand for tithes; nor for rent before the day upon which it was payable under the demise: if, therefore, there is any right either in law or equity, it is upon the circumstance that the persons who were to tender the rent are disposed to pay a sum of money, as and for the rent of the whole year, from motives of conscience or otherwise. The right of the succeeding incumbent is to take his tithes in kind; not a right to that sum as and for rent. The lease was void absolutely upon the death of the former incumbent: but the defendant received this sum as rent. The question therefore is, whether, if these farmers, who were the tenants, thought proper to pay a sum of money, not in respect of those rights the defendant had from his induction, but as rent under a lease, having run out in the time of his predecessor, there is any right in the executors to a proportion; or, in other words, whether it is not to be considered as money paid to their use, or in this court to be accounted for. Previously to this statute (a), there is no doubt a tenant for life and his executor lost the rent from the last day upon which it was payable. But the question is, not whether they lost it in this sense, that they could not recover it; but whether, if a person under no obligation thought proper from conscientious motives to pay, it is not to be considered paid for the use of the person under whom the enjoyment was had. In *Paget v. Gee* (b), the payment was made by a person not bound in law; and it was held, that the person receiving was accountable, and that the proportion must be

1803.

Hawkins
v.
Kelly.

ing ceased by his death, the succeeding incumbent received from the lessee a sum of money, as the rent due for the whole year, in the course of which the lessee died, the executor is entitled to an apportionment, and a demurrer to his bill was over-ruled.

(a) Stat. 11 Geo. 2. c. 19. s. 15.

(b) Ambler 198. Burn's Justice, titl. *Distress*. Reg. Lib. B. 1753. fo. 68.

1803.

Hawkins
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that according to the statute. In *Whitfield v. Pindar*, in the court of Common Pleas (a), it was held even at law, that a lease by tenant in tail was within the statute, and the executor was entitled to an apportionment. In *Vernon v. Vernon* (b), some of the tenants had leases; others had not, but were by agreement tenants from year to year. The question was, whether a proportion of the rents paid to the receivers was due to the administrator of *Henry Vernon*, who was tenant in tail. The case of *Lord Strafford v. Lady Wentworth* (c) was cited: in which case, the tenant in tail having died on the rent day, and the remainder-man having received the rent, it was held, that it should be paid over to the representative of the tenant in tail. There it might be said the tenant had lived till the day began upon which the rent was payable; but that is not the only principle upon which the decision is put; the other is recognized also. Lord *Thurlow* had great doubt upon the question, and determined that where the occupier held without a lease, he should not be permitted to say it was from year to year, though his bargain was for that; but, in order to give the executor a proportion, the court would imply, that the occupier was not tenant from year to year, and would consider him tenant at will, therefore neither affirming nor denying. *Paget v. Gee*, and the other cases.

My difficulty upon that is, how to imply a different contract out of the express contract, in order to raise this equity, which is a much more difficult operation than that of those cases; and I really think there is a very fair principle in those cases; for it amounts to this, a person by contract is bound to pay 60*l.* a year and no more; being so liable, he lives another year, except one day, enjoying the whole profit; he feels, under those circumstances, that it is morally right, that he should pay for the enjoyment, though not bound; and, under that impression, he pays the money to another person who has no manner of title, but who receives it as and for rent. Then if it is paid in respect of the enjoyment under the other, why not infer that in law it was paid to the use of the person under whom he had the enjoyment? Upon that principle, *Whitfield v. Pindar* may very well be supported; then if it is so at law, the question is, whether the demurrer will not hold as the relief is sought in equity. But in *Paget v. Gee*, it was held that relief should be given in equity. I am not inclined to go against that authority; and though Lord *Hardwicke* followed the law, I do not apprehend, there is an end of the equity: because a court of law afterwards, in *Whitfield v. Pindar*, followed that decision.

Demurrer over-ruled. (d)

(a) H. 1781.

(c) 9 Mod. 21. Pre. Cha. 555.

(b) 2 Bro. C.C. 659.

(d) See also *Williams v. Powell*, 10 East 269. *infra* 1647. *Ex parte Smyth*, 1 Swanst. 337. n.

Sittings after H. 43 Geo. III. A.D. 1803. Scac.

1809.

Kynaston v. The East India Company. [4 Price 84.]

Feb. 25.

BILL by the impropriate rector of *St. Botolph* against certain occupiers of houses and warehouses, for the tithes thereof, according to the improved value. Defendants pleaded, that, as owners of the buildings, they had never paid any rent for their occupation, that there were formerly some obscure buildings on the same site, which most probably never paid any rent; they admitted having paid 1s. in the pound to the plaintiff for tithes after a rate of 300l. a year, (the proportion of the land tax) from the year 1776 to the *Midsummer* then last, but insisted it was in their own wrong.

S.C.
Noticed,
13 Ves. 9.
A warehouse in the parish of *St. Botolph*, built on sites of houses which had never paid rent, liable to tithes after the rate of 2s. 9d. in the pound, according to the annual value, under the statute 37 Hen. 8, c. 12. and decree.
• *Supra* 228.
† *Supra* 1314.

Macdonald, Chief Baron.—This defence proceeds on the notion that as no rent has ever been paid for these premises, there is no criterion by which they can be assessed under this stat. (37 Hen. 8. c. 12.); and it is therefore concluded, on the authority of *Skidmore v. Bell**, that these buildings are not tithable. In the cases in the decree book, said to have decided that tithes must be paid according to the *rent* or *value*, the words appear to be used synonymously, and so they are in the reports and schedules: two cases cited go to this point. *Bramston v. Heron*†, an exemption was claimed for a new built house on the site of old houses, because no rent had been paid, and tithes were decreed to be paid for the new house. There was no necessity to resort to value in that case, because there was a rent; but it shews that a new-built house ought to pay. *Williamson v. Gosling* goes the whole length. The claim of the rector and the situation of *Gosling*'s two houses was the same which were built on the sites of four; three of which had paid ancient sums. Defendant said he had formerly occupied one of the houses of about the yearly value of 100l. Now that was the case of a house built on the sites of old houses, and the decree was, that as to the three, they were protected by the ancient payments, but that the defendant should pay 2s. 9d. in the pound for the new house according to the yearly value, which was about the value stated. Compare these cases; this is that of a warehouse built on sites of houses which had never paid rent, and was therefore on all fours with the case cited; therefore the decree must be for 2s. 9d. in the pound according to the annual value; as the case is entangled, no costs. Affirmed in the House of Lords. (a)

Supra 902.
not so fully stated.

Feb. 25,
1813.

(a) *Sheffield v. Pierce*, *supra* 503. *Ivatt v. Warden and Minor Canons of St. Paul's v. The Warren*, *supra* 1054. *Sayer v. Mumford*, *supra* 546. *Kynaston v. Willoughby*, *supra* 891. n. *Paul's v. Crickett*, 5 Pri. 14. *Dean*, 4 Pri. 65. *infra*. *Minor Canons of St. Paul's*.

1803.

M. 44 Geo. III. A.D. 1803. Canc.

Nov. 21.

The Warden and Minor Canons of St. Paul's, London, v. Morris; and Morris v. The Warden, &c. of St. Paul's. [9 Ves. 155.]

After two trials at bar in favour of the claim of the warden and minor canons of St. Paul's, to tithes at 2s. 9d. under the decree and stat. 37 H. 8. upon an issue, whether any, and what less sum had been paid; a new trial was refused, though evidence was rejected that ought to have been received, this being in the discretion of the court for its information; and all the evidence, though proving that less than 2s. 9d. had been paid, not shewing any certain payment in lieu of tithes, Qu. 1st. Whether issue ought to have been directed in the cross-cause, as being upon the bill of mere lessees not owners. 2dly, As tending to proof of a payment

THE bill in the first of these causes by the Warden and Minor Canons of *St. Paul's* and their lessees stated their title as parson and proprietors of the church of *St. Gregory*, under letters patent, 24. H. 6. to all tithes, &c. within the said parish, and the decree and stat. 37 H. 8. c. 12. for the payment of 2s. 9d. in the pound. The bill also stated the stat. 22 Car. 2. c. 11. for rebuilding the city of London, uniting the parishes of *St. Mary Magdalen, Old Fish Street*, and *St. Gregory*, and the stat. 22. and 23. Car. 2. c. 15. fixing the tithes of those two parishes at 120*l.* both those statutes saving expressly the rights of the plaintiffs as parson and proprietors, &c., to receive all tithes, &c. within that parish as before; and stating further a dispute about the payment of that sum of 120*l.*, and an order made by Lord *Shaftesbury*, upon petition, directing that sum to be raised upon both parishes, and paid to the incumbent and his successors, the bill prayed an account of the tithes due from the defendants occupiers of houses within the parish.

The defendants, by their answer, set up various payments less than 2s. 9d. in the pound, as customary payments for the respective houses in lieu of tithes, and stated that they could gain no information as to the sum to be paid; that in 1763, the last of the leases usually granted by the warden, &c., was suffered to expire by the parishioners; insisting that they were not liable to pay the annual sum assessed upon the united parishes under stat. 22. and 23. Car. 2. for the maintenance of the incumbent; and also to make the accustomed payments to the warden and minor canons. They insisted, that if the parishioners were bound to pay tithes at the rate of 2s. 9d. in the pound, the tithes would have amounted, during the continuance of the lease so granted, to an annual sum greatly exceeding the rents reserved, and the fines paid upon renewal, and they insisted upon the said leases and the said invariable annual payments made for the premises respectively occupied by defendants, as evidence that the said decree for tithes never had any operation in the parish of *St. Gregory*, and that, at the time of making the decree, the inhabitants had been accustomed to pay certain ancient and invariable annual sums in lieu of tithes less than in the decree specified. They further insisted, that the provisions in the two statutes of Car. 2. reserving to the warden and minor canons the right to all tithes, &c. within the parish of *St. Gregory*, were so introduced in order to obviate all doubts respecting such tithes under the provisions of the said acts, by reason that there could be no regular incumbent of the said parish, the church being, by the letters patent,

to be served by the warden or one of the canons; and that, notwithstanding the provision in stat. 22 and 23. *Car. 2.*, the warden, &c. were bound by that act to allow, out of the ancient accustomed payments to them in lieu of tithes towards the assessment made on the parish of *St. Gergory*, such sums as the warden, &c. have been accustomed and ought to have paid by way of compensation for the service of the church, as its rateable proportion of the sum of 120*l.*, settled by the act for the annual maintenance of the incumbent of the said united parishes.

The amended bill charged, that the inhabitants had not, at the time of the decree in 1345, and from time whereof, &c., been accustomed to pay any certain invariable sums, in lieu of tithes; but that they were variable, and charged, as evidence of such variation, two copies of assessments, one entitled, "first, or ancient rate;" the other, "last rate, or new rate;" in which it appeared that the payments assessed by the later rate, exceeded, in most instances, the former rates, and that on the first rate there are assessments at 2*s.* 9*d.* in the pound, or in assessments divisible at that rate.

Defendants by their answer to the amended bill, insisted upon the said assessment, entitled "first or ancient rate," stated in the amended bill as evidence, that the ancient and accustomed annual payments were according to such rate, and that where the sums paid differed, such difference must be taken to have crept in in course of time from the ignorance of the parties of their ancient right.

Defendants, by their cross-bill, prayed the establishment of the ancient and accustomed payment for and in lieu of tithes set up by their answer: and by amendment adopted the first or ancient rate.

An issue in *K.B.* was directed by Lord *Loughborough* to try generally, whether any, and what sum less than 2*s.* 9*d.* in the pound had been paid. Verdict for the *Warden, &c.*, upon the ground, that the parish books could not be admitted as legal evidence: upon a second trial, directed at the bar of the Exchequer, a second verdict for the *Warden, &c.*

Mr. *Mansfield* and Mr. *Leach*, for the defendants, in the first cause, moved for a new trial, principally on the ground, that the proceedings in an old cause, *Morris v. Turner, temp. Car. 2. Scacc.*, in which a decree was made, by consent of the *Warden* and *Minor Canons*, subject to a reference in which no award appeared, had been rejected as evidence.

The *Attorney-General*, Mr. *Richards*, and Mr. *Stanley*, shewed cause against the motion: citing *The Bishop of Lincoln v. Ellis**, *Lygon v. Strutt.†*

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different from that relied on by their answer, and the establishment of which was prayed by their bill.

* *Supra* 632.

† *Supra* 1430.

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The Lord Chancellor. — Upon the first trial of this issue in the court of *K.B.*, the evidence of the books was rejected, on the ground that they were not at liberty to receive evidence not legal evidence, unless directed by the order of this court. Upon the new trial at the bar of the Exchequer, an order was made, that the plaintiffs were to be at liberty to produce the books of the vestry and churchwardens, and though there was some altercation, the opinion of the court was, that the Lord Chancellor meant, that this evidence should be read; and I think, it was the right construction of the order.

The motion now made is principally upon the ground, that evidence was rejected, and that it is material to the fact in issue. This cause is novel. The answer of the *Minor Canons* is expressed in terms novel and unusual. The cross bill of the defendants sets up their claim. This is the first bill under which occupiers, not owners, have had a decree for establishing payments in lieu of tithes. They have, however, in this instance, had that decree. (a) The *Minor Canons* amended the bill, bringing forward, out of their repository, this old book, entitled, "A Register of the Lands and Tenements belonging to the Minor Canons;" in which are contained the rates of *St. Gregory's*. Their answer to the cross bill also disclosed the contents of this book. The defendants to the original bill could not amend their answer: but they put in another answer varying the defence; and they amended their bill by striking out the payments, the establishment of which they had prayed, and inserted others; making their claim correspond with their defence.

Supra 633.

An issue was directed according to that directed in *Bennet v. Trepas*, a case which is nothing like an authority for directing such an issue; for in this case, as understood at the hearing, the defendants had not, as in that, put themselves upon the point that different sums had been paid at different times, which, nevertheless, might as the three judges observe, be aliquot parts of some pound rent, or rate, invariably paid in the parish; the defendants therefore, not having stated themselves any precise payment, the court directed an issue, whether any, and what less sum had been paid; putting it upon the defendants to shew, that these sums, though varying in appearance, did not vary in fact, as they would not, if aliquot parts of that larger sum. The three judges, who, with the approbation of the House of Lords, thought that issue ought to be directed, were of that opinion, not in a case where the record contradicted itself, but upon a record stating that some larger sum ought to be the permediate.

(a) *Warden and Minor Canons of St. Paul's v. Crickett*, 2 Ves. jun. 563. *supra* 1425.

The difficulty in this case is, that the issue is directed in the conjoint cause. Suppose the occupiers may file a bill, leaving out the owners, who may file another. I do not recollect an instance in which this court, upon a bill to establish customary payments of any nature, that bill seeking to establish the sums therein specified, has permitted such a plaintiff to try, whether he could avail himself of any other payment. His bill being brought to establish that payment, if he cannot establish it, the bill ought to be dismissed; or, if he attempted in an issue to set up a payment, for the purpose of supporting his bill, different from that which it prays to establish; the court ought to restrain him: and no issue ought to be directed; but whether the payments stated in the bill are the payments. There is nothing in *Bennett v. Treppas* that can be considered an authority for a decree for these defendants, if any other payment had been proved.

The most material exception to this doctrine is, where a plaintiff seeking payments of any species or tithes in kind, by his evidence introduces doubt whether he is entitled to make a demand against his common law right. Upon the trial in the court of K.B. it was thought necessary, but very difficult to say, what must be said upon the statute, that a less sum than 2s. 9d. in the pound was accustomed to be paid, and the person asserting that a less sum was to be paid, must prove what that sum was. Whatever is the difficulty of believing that sum could have been paid before the time of H. 8. the plaintiffs must succeed, unless the defendants can prove what less sum was paid. There appears not to have been sufficient discussion in the court of K. B. as to the meaning of the expression, "accustomed to be paid;" at first it was represented to be beyond the time of memory; but that was pared down, and very properly, so as to leave the construction open; and *Bennett v. Treppas* shews it is not necessary to construe it to that extent; but upon the statute it was there considered that eight years were sufficient. It is not, however, to be considered settled in that case, that that is to be the period. Others have said it is sufficient, if within the limits of the ecclesiastical law, which are much shorter than the time of memory. All the evidence, so far from supporting, was against a customary payment. No attempt was made to prove any payment other than what had been put upon the record.

There is no doubt of the right of this court to grant a new trial after a trial at bar. Courts of common law had great difficulty in doing that; but in those very cases it is admitted to be the practice of this court, where the issue is directed to inform the conscience of the chancellor; upon this principle that it was the habit of this court to try, upon the report of the circumstances, viz. the trial and all the objections, whether due attention had been given to all the

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If plaintiff in a bill to establish customary payments, puts himself upon one *modus*, and proves another, there must be a decree against him.

Customary payments under the statute need not be immemorial.

The court has a right to grant a new trial after a trial at bar.

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considerations stated; whether, according to the common expression, the conscience of the court was satisfied or not. The difficulty upon my mind, from the first moment this cause was brought forward, was, whether if the counsel for the defendant had stated that they meant to go to a new trial to prove a payment different from that in their bill and answer, the court ought not to have dismissed their bill, if they gave up what was stated in it; and if they could not defend themselves according to their answer upon the bill against them, not binding the inheritance, but being a bill for an account against mere occupiers, and they could not defend themselves, there must be a decree for an account; and if they could make another ground, it must be by a new bill.

Between the two trials this discovery is said to have been made. The stat. *Car. 2.* (22 & 23 *Car. 2. c. 15.*) for assessment of the parishes to be united, directs transcripts to be sent to the vestry, the Lord Mayor, and the registry of the Bishop of *London*. It does not appear, that there were transcripts in the offices of the vestry or the Lord Mayor, but in the registry of the Bishop of *London* there was a transcript of the assessments of 1676 and 1681. The rates of 1672 and 1681 nearly correspond; that of 1676 differs materially from both. Then it occurred naturally, that those which were found there were assessments for raising the joint demand upon the united parishes; and that the rate of 1676 was not a rate for the stipend of the minister, but, according to the note in that book, a rate for the minor canons tithes from *March* 1676 to 1677; and then the case took this turn, that there was a less rate, and it was proposed to prove, that the less rate was composed of the sums in the rate of 1676.

The next question is, whether the evidence that was rejected ought to have been received; and if so, the consequence of its rejection. There is little evidence what was the actual payment to the plaintiffs in lieu of their tithes: it stands thus as to any less payment. In the time of the commonwealth they granted a lease to *Morris*, as rector of *St. Gregory's*. A bill was filed by him in the court of Exchequer for payment, according to the statute of 2s. 9d. The lessees of the minor canons stated customary payments. At the hearing, a reference was made to the Attorney-General, and no award was made. The minor canons, interested in the proceedings, became parties to the reference made by their consent given in court. The question is, whether, because no award was made, it is not evidence in any degree? If for a century and a half afterwards no payment was made according to the demand, but payments were made according to the custom, more or less, it is difficult to say it is not evidence; as to the weight of it, that is a different question. It ought to have been admitted, not

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to prove any allegation in the bill or answer, but merely to substantiate this fact, that the demand had been made and was not pursued; and if that circumstance would have been evidence, supposing there had been no suit, it is impossible to say it is not evidence, because the demand was made in a more solemn manner. That evidence, therefore, if produced only for the purpose of shewing that a demand was made, and was referred to arbitration, that no award was made, and the minor canons and their lessees had not insisted on their demand afterwards, was to be received; at least upon the question, whether any less sum was paid?

With regard to the rejection of that evidence, the principle upon which this court is to act is this: this court has a right to be exercised very tenderly and sparingly of deciding without an issue. Upon the payment, as stated upon the record as it stood at the original hearing, I should have thought the court had a right to refuse; but if asked, ought to have directed an issue. I should have doubted whether it should have been directed in the conjoint causes, doubting whether a mere lessee could file such an establishing bill. But I could not have refused it upon the customary payments stated in the answer to the bill of the minor canons. In *Bennett v. Treppas*, when the court saw the parties were not agreed upon the sum, I should have granted an issue, but should have put it upon the defendants to say what was that sum. It is not sufficient to say there is some payment, and I cannot agree, that because 2s. 9d. is so enormous that it is not to be decreed, for the court has directed issues and decreed accounts in cases as enormous as in the *St. Bride's* case. (a)

Right of the court to be exercised very tenderly, of deciding upon facts without issue.

Supra 1624.

Upon the other question, suppose customary payments discovered in the rate of 1776 between the two trials. That case of *St. Bride's* is very like this, and there the decree was made without an issue. In granting a new trial in all times, this court, in such a case as this, has exercised its discretion upon the whole case. New trials after trials at bar have been granted here when the courts of common law would not grant them, upon this consideration whether the cause was tried in such a way as to be satisfactory; and if the jury have given such a result, the question which I think the court ought to ask itself, is, whether the jury would miscarry in making a different conclusion upon the rejected evidence?

New trials after new trials at bar granted here, when the courts of law would not grant them.

The next consideration is, whether this evidence would produce a different result? Upon the question whether this rate of 1676 ought to have gone to the jury, it was quite competent to the defendants to offer that as composing the customary payment upon which they were to insist. They said that this decree was made

(a) *O'Connor v. Cooke*, 6 Ves. 665.

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in 1545; that the minor canons had for two centuries and a half a right to call for 2s. 9d.; that the law making that demand for them daily from 1545, they had only asked a very small fractional part, that they had been contented with this small fractional part down to 1763, and that it was to be inferred that they were contented with it from 1545 to 1672; that there is the most decisive evidence that 2s. 9d. never had been received; where it is clear that something, not 2s. 9d. in the pound, has been paid, you are to endeavour to apply it so as to fix the accustomed payment. I have nothing to do with the enormity and injustice of the demand, though certainly it is most likely that it was understood that less than 2s. 9d. was to be due to them. But if you cannot ascertain by rational evidence, not conjecture, that there was some certain payment, the second proposition fails; and then the question is, whether the jury have had distinctly stated to them, that the rate of 1676 was insisted on, and the difference between that and the other two, and the necessity of their concluding, that the rate of 1676 was to give the rate of payment; yet if, upon the rest of the evidence, they refuse to fix it to be that, I am to grant a new trial. The difficulty upon the evidence, though very clearly proving that less than 2s. 9d. was paid, to prove what was paid is extreme, applying it to either rate. The proposition that, because the lease was at less than the value, therefore tithes are payable at a certain rate, is not made out. Upon the very case made for the defendants, there is great difficulty as to the certainty of the payment. There might be a fixed payment for the scite of the houses, or a pound rent, or individual payments upon the individual houses. If a pound rent, that must be capable of increase, which does not at all weaken the certainty of the demand. But the case has been put as of individual payments for individual houses. Then is the negligence to be pressed all against the plaintiffs, and not against the defendants? Upon all this evidence the conclusion is, that great difficulties surround the case, but no evidence can be produced fairly to satisfy a jury what is the payment to exempt the defendant from this demand, *prima facie* due, and which will be paid, I believe, through the difficulty of shewing what is the customary payment. Admitting that I do not believe that 2s. 9d. was the payment, if I cannot find out the payment, I must submit to necessity, and I think therefore that there ought not to be a new trial. (a)

(a) See *Warden and Minor Canons of St. Paul's v. Kettle*, 2 Ves. & Beam. 1. *infra*.

